TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 25

BENJAMIN McNABB, FREEMAN McNABB, AND RAYMOND McNABB, PETITIONERS

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1942
CERTIORARI GRANTED JUNE 8, 1942.

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INDEX

1 In the United States District Court for the Eastern District of Tennessee, Southern Division, Chattanooga, Tennessee

No. 89—Murder

UNITED STATES OF AMERICA

vs.

BENJAMIN McNABB, FREEMAN McNABB, AND RAYMOND McNABB

1-A *Bill of exceptions*

Filed Feb. 20, 1941

* * * * *

Testimony of SILAS E. ANDERSON

(The jury herein retired at the request of the defense for purposes of introducing any statements that any of the defendants might have made as to that particular hat.)

Cross-examination by E. B. BAKER, Esq., of Defense Counsel:

While the jury was still excluded the witness testified further: The first statement I heard Barney McNabb make about the hat was at the cemetery on the first day of August. The hat was lying on the ground about the center of the cemetery and someone asked Barney if he knew whose hat it was and he stated that he did not. He was at the cemetery at that time and the next statement he made, that I heard, he stated that the hat was his; and that was in Room 57 in this Building on the morning of August 3rd in the presence of the four defendants; they had already been asked about the hat in the presence of each other; they were all questioned about the hat; Barney said the hat was his and he was being questioned by Mr. Taylor. I do not know how long he had been questioning him and I hadn't heard of any threats made. I know he hadn't been mistreated in my presence and he hadn't been promised anything in my presence. I was in and out and I don't know how long *long* he had been in charge; I would go out and come back and I do not know how long he had been in there before he said that was his hat, but he had been questioned more than once. I do not know how long he had been in the office being questioned before he made that statement, and the first time I saw him was in the office on the 2nd and was examined there on the 3rd. To the best of my judgment he was there from the second until the third, but

he did not stay there continuously; he was there, again on
2 the night 2nd and held until the morning of the 3rd, that is when he admitted this was his hat. I did say that he was there until midnight on the 2nd and when he was not being questioned he was carried back to jail. I do not know when he was brought back, but he was there just after midnight on the 3rd and to the best of my judgment between one and two o'clock. I do not know whether or not he was arrested, but he was in custody when I first saw him on the first day of August in the morning. He was taken back to the cemetery to the scene of the crime and brought back in where they carried him to jail; I don't know when they brought him back here but he was in Room 57 in my judgment as late as 2 o'clock in the morning of the 3rd, and they were not kept here; they were all taken back to the jail at near 2 o'clock. That is the last time I saw him, about two o'clock on the morning of the 3rd of August, and that is when he made this statement, or somewhere near that time; it might have been one o'clock. I didn't say they had been in the office there all day and most of the night and I don't know what time they were brought down here and I don't know when was the first time I saw him before midnight of the 2nd, but I did see him at 12 o'clock on the night of the 2nd, but I don't know who brought him back there or how long he had been there and I wouldn't say whether or not he was in the office there as early as 6 o'clock, or 7 o'clock, or 8 o'clock, or 9 o'clock, or 10 o'clock. I don't know; but as near as I can place him I did see him at 12 o'clock and again at 2 o'clock on the morning of the 3rd. He was not questioned continuously in relays by the officers all that time, but different ones at intervals, and we questioned these defendants one at a time and separately, too. I didn't question any of them myself, I
3 just heard it. I did not have a warrant for Barney McNabb's arrest at that time and I do not serve warrants, but he was in custody and I don't know whether a complaint had been taken for him or not and I would like to make this statement, some of these defendants were brought into the office several minutes before I heard Barney make a statement about the hat. I would not be positive just what defendants they were not all in the office on the 2nd or 3rd. I wouldn't say positively which ones were brought out and which were not. Upon being questioned by the Court the witness replied. I heard no threats or promises whatever, and there were no forces used nor any lights used on them. They had good seats; some of them were carried out to get sandwiches, hey bought soca-colas for them and treated them as nicely as anybody.

Cross-examination by OTTO AULT, Esq.:

I did not at any time make any threat or use any force on these defendants, nor did I at any time promise them anything, and I didn't hear anybody else. I don't know whether the other officers did or not, I know they did not in my presence.

The question was here taken up between the Attorney for the Government, the defense Attorney, and the Court as to hearing the evidence in regard to admission of certain statements made by the defendants and to the exclusion of the jury.

4 RE-CROSS-EXAMINATION

Questions by E. B. BAKER, Esq.:

R. X Q. 1. You came to Room Number 57 on the morning of the 1st of August.

A. Yes, sir.

R. X Q. 2. Raymond McNabb was at that time in custody in Room 57?

A. I don't know about that.

R. X Q. 3. Do you know whether he had been arrested?

A. I had heard that he was, but I don't know.

R. X Q. 4. Raymond McNabb is the one I am talking about?

A. I had heard he had been arrested.

R. X Q. 5. I will ask you if you don't know that he was put in the bull pen about 2 o'clock that morning, and kept there all night and the next day?

A. No, sir; I don't know that.

R. X Q. 6. Did you see him in there on the day of Aug. 1st?

A. No, sir.

R. X Q. 7. Did you see him anywhere on the 1st?

A. I don't recall it.

R. X Q. 8. When did you first see him?

A. I wouldn't be positive, but it was not on the 1st. I think it was on the 2nd.

R. X Q. 9. What time on the 2nd, did you see him?

A. I don't know.

R. X Q. 10. Where did you see him?

A. In Room 57 or Room 58.

R. X Q. 11. What time of the day was that?

A. I don't know.

R. X Q. 12. Do you know where he had been before that?

A. No, sir; I do not.

R. X Q. 13. Who was present in the room when you saw him?

A. I don't know.

R. X Q. 14. Any other officers there?

5 A. I am sure there was, but I don't recall.

R. X Q. 15. Did anybody question Raymond?
A. They did, but I don't know——
R. X Q. 16. When did they question him then?
A. I don't know.
R. X Q. 17. Do you know which one is Raymond, as you know which one?
A. Yes, sir; I do; the second over there from the left [indicating].
R. X Q. 18. This one here [indicating]?
A. Yes, sir.
R. X Q. 19. You don't know the time of day; you don't know who was present when he was being questioned?
A. No, sir. He was questioned on the 2nd.
R. X Q. 20. How do you know he was?
A. I was there when he was being questioned.
R. X Q. 21. What time of the day were you in there when he was being questioned?
A. I don't know.
R. X Q. 22. Who was doing the questioning?
A. Mr. Taylor or Mr. Beman.
R. X Q. 23. What time of the day was that?
A. I don't know.
R. X Q. 24. Sometime in the afternoon?
A. I don't know. I was in and out, and I wouldn't say.
R. X Q. 25. You don't know how long he stayed there?
A. No, sir.
R. X Q. 26. You don't know how long Mr. Taylor or Mr. Beman questioned him?
A. No, sir.
R. X Q. 27. You saw him again on the 2nd, before midnight?
A. I saw him on the 2nd; I wouldn't say what time.
R. X Q. 28. It was at night?
A. I saw him in the daytime.
R. X Q. 29. You saw him at what time?
A. I don't recall.
R. X. Q. 30. Was it about 2 o'clock in the morning?
A. That was on the 3rd.
R. X Q. 31. When he made some sort of statement?
A. Yes, sir.
R. X. Q. 32. He had been in the officer and questioned continuously all day on the 2nd and all night up until 2 o'clock on the 3rd?
A. No, sir.
R. X Q. 33. Were you in there all the time?
A. No, sir.

R. X. Q. 34. You don't know how long he had been questioned?

A. No, sir.

R. X. Q. 35. How long were you present when he was questioned?

A. I couldn't state that; I don't know.

R. X. Q. 36. As much as five minutes?

A. Longer than that.

R. X. Q. 37. As much as 4 hours?

A. I was in the office on the 2nd from about 7 o'clock until the 3rd about 2 or 3 o'clock. He was not in there all that time.

R. X. Q. 38. Do you know whether he was somewhere else in this building?

A. No, sir; he had been taken back to the jail.

R. X. Q. 39. How do you know?

A. I know somebody carried him to the jail and went back and got him.

R. X. Q. 40. Do you know what time they went back and got him?

A. No, sir.

R. X. Q. 41. Did you see anyone bring him back?

A. I was in the office when he came in.

R. X. Q. 42. Did you see them take him away?

A. Yes, sir.

R. X. Q. 43. You saw them leave the building?

A. I saw them leave the office.

R. X. Q. 44. Do you know whether they went to the jail?

A. No, sir; I couldn't say.

R. X. Q. 45. And it was about 2 o'clock in the morning before he made a statement of any kind?

A. I wouldn't say 2 o'clock, between 12:00 o'clock and 2 o'clock.

R. X. Q. 46. That was on the 3rd of August?

A. Yes, sir; that he made a statement in the presence of Benjamin and Freeman McNabb.

Mr. BAKER. We want to call Mr. Taylor.

By COURT. They say he is not here.

Mr. BAKER. That is what we were talking about. Are any of the others here?

By COURT. You gentlemen could have had him subpoenaed here.

By Mr. BAKER:

R. X. Q. 47. Can you give me the name of any other officer present at the time these defendants were being questioned. Raymond McNabb in particular.

A. No, sir; I could not.

R. X. Q. 48. Do you know of any other officer.
A. I wouldn't be positive who was in there at the time.
R. X. Q. 49. Was Mr. Beman there?
A. I am not sure; he could have been.
R. X. Q. 50. Was Mr. Burke?
A. I don't know that.
R. X. Q. 51. Mr. Jakes?
A. I don't know.
R. X. Q. 52. Was Mr. Kitts?
A. I don't know.
R. X. Q. 53. Was Mr. Levy there?
A. I don't know.
R. X. Q. 54. Was Mr. McKinney?
A. I don't know.
R. X. Q. 55. Was Mr. Renick?
A. I don't know. They were in and out. Some were in there, but I don't know which ones.
8 R. X. Q. 56. Was Mr. Sullivan or Mr. Lallinger?
A. I don't know.
R. X Q. 57. Was Mr. Ricketts there?
A. I don't think so. Some of those men were there, but I don't know which ones were there.

Mr. BAKER. Call R. A. Beman.

9 (The jury is still retired from open court upon examination of the following witnesses:)

The witness, R. A. BEMAN, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

Q. 1. Are you connected with the Alcohol Tax Unit?
A. Yes, sir.
Q. 2. What is your position?
A. Assistant Supervisor.
Q. 3. Did you question Raymond McNabb in reference to this case?
A. Yes, sir.
Q. 4. When did you question him?
A. On the 1st and 2nd of August.
Q. 5. On the 1st of August and the 2nd of August?
A. Yes, sir.
Q. 6. Where did you question him?
A. In the office of the Alcohol Tax Unit at Chattanooga.

Q. 7. In Room Number 57?
A. Yes, sir; and Number 58.
Q. 8. When did you first question him on the 1st?
A. It was in the afternoon.
Q. 9. Where did you question him?
A. In the room I spoke of here.
Q. 10. Did you send anywhere to get him?
A. I don't know that I did. He was in the custody of the Marshal.
Q. 11. That was on the afternoon of the 1st?
A. Yes, sir.
Q. 12. How long did you question him?
A. I don't recall. I talked to him for probably half an hour.
Q. 13. Who was with him when you got him?
A. Well——
Q. 14. What did you do with him, when you got through?
A. I turned him over to the Marshal.
Q. 15. Where did he take him?
A. I don't know.
Q. 16. When did you next question him?
A. On the following day.
Q. 17. On the 2nd of August?
A. Yes, sir.
Q. 18. What time of the day was it?
A. At different times during the day.
Q. 19. How many times during the day?
A. I don't recall exactly, probably three times.
Q. 20. How long did you talk to him on those occasions?
A. We would talk to one and then to another, probably 15 or 20 minutes or half an hour at a time.
Q. 21. Where was he during the day of the 2nd, was he in the Marshal's office, or where?
A. Part of the time in the custody of the Marshal, and part of the time in the office.
Q. 22. He remained in this building all the time?
A. Yes, sir.
Q. 23. When you called him back from the jail on the 2nd, did you have him sent back?
A. I don't recall; it was in the evening.
Q. 24. When did you send back after him?
A. Late at night.
Q. 25. 9 or 10 o'clock at night?
A. Yes, sir.
Q. 26. Was he brought back to Room 57?
A. Yes, sir.

Q. 27. How long was he kept there then?

A. Until after midnight.

Q. 28. Three or four o'clock in the morning?

A. No.

Q. 29. As late as 2 o'clock?

11 A. Between 1 and 2 o'clock.

Q. 30. Was he questioned from 10 o'clock to 2 o'clock?

A. No, sir.

Q. 31. How many different men did you have there questioning Raymond McNabb concerning this case?

A. There were a number of officers taking part in the investigation, Mr. Taylor, Mr. Palmare, Mr. Kitts, Mr. Bevans, Mr. Burke, and some of the men stationed here, Mr. Jones and others.

Q. 32. Do you know how many times various other agents or investigators questioned this defendant?

A. I was present about all the time that he was questioned.

Q. 33. At all times any of the others were questioning them?

A. Yes, sir.

Q. 34. Were they all five present in Room 57 from 9 or 10 o'clock on the night of the 2nd, until about 2 o'clock on the morning of the 3rd?

A. They were not altogether; they were down there. There are three rooms there.

Q. 35. All present in the building?

A. Yes, sir.

Q. 36. Were they questioned separately?

A. Questioned separately and then all together.

CROSS-EXAMINATION

Questions by Otto Ault, Esq.:

X. Q. 1. Did you hear any of these other officers at any time ever offer any immunity or any reward for the testimony of these defendants?

A. No, sir.

X. Q. 2. Did you ever offer any inducement, or any intimidation, either bodily abuse or mental abuse to get them to make any statement?

A. No, sir.

X. Q. 3. Were their constitutional rights explained to them, if they didn't want to make any statement?

12 A. Yes, sir; fully.

X. 4. Were these statements made voluntarily on their part?

A. Yes, sir.

X. Q. 5. Did they offer to make any statement to you?
A. They did make voluntary statements.

REDIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

R. D. Q. 1. You say they volunteered to make statements?
A. Yes, sir.
R. D. Q. 2. That was about 2 o'clock on the morning of the 3rd?
A. No, sir.
R. D. Q. 3. Did they volunteer to make a statement before that?
A. They came into the office for the purpose of making a statement, and the first think they did they said they were anxious to make a statement.
R. D. Q. 4. You say they came into the office, the officers had gone to the jail, they were in bed asleep, they sent for them?
A. That is at the last. I am talking now about the beginning.
R. D. Q. 5. They wanted to make a statement at the beginning?
A. They did.
R. D. Q. 6. You agents did not get it until 2 o'clock on the morning of August 3rd?
A. That is not correct.
R. D. Q. 7. That is when you did take it?
A. No, sir; at other times; during that time.
R. D. Q. 8. Why did you continue to ask them?
A. There were certain discrepancies in their stories, and we were anxious to straighten them out, and the best way to do it was to get all five of them together, they all having stated they were anxious to tell the truth about it. That was the reason for bringing them down the last time.
R. D. Q. 9. Couldn't you have waited until the next morning to get them straightened out, was it necessary to straighten them out at 2 o'clock in the morning?
13 A. They were all finished before 2 o'clock.
R. D. Q. 10. You got all the discrepancies straightened out?
A. That is correct.
R. D. Q. 11. Between 10 o'clock and 2 o'clock in the morning?
A. Somewhere during that time.
R. D. Q. 12. Was anybody told they were yellow, or called a damned liar?
A. Nobody that I know of.
R. D. Q. 13. Did you hear anybody called a damned liar?
A. No a damned liar.
R. D. Q. 14. Anybody tell them they were liars?
A. They admitted they were.

R. D. Q. 15. Did any of the officers tell them they were a liar?

A. Yes, sir; they did.

R. D. Q. 16. How many times?

A. I did not keep track of that.

R. D. Q. 17. Many times or few times?

R. D. Q. 18. When they got a statement you didn't right, you would tell them they were a liar?

A. No; I didn't.

R. D. Q. 19. You said you did?

A. They were told that they were lying.

R. D. Q. 20. Particularly Barney McNabb?

A. When they would make a statement we did not think was true, they would be told it was not true, not necessarily that it was a lie.

R. D. Q. 21. You told them repeatedly from 10 o'clock on that night until 2 o'clock the next morning?

A. No, sir.

R. D. Q. 22. Until nearly 2 o'clock?

A. No, sir. These statements were all taken before that time. We had interviewed all the men before 10 o'clock on the night of the 2nd.

R. D. Q. 23. Did you hear anybody threaten to knock one of them out of his chair because he was lying?

A. No, sir; I don't know about that.

14 R. D. Q. 24. That could have happened?

A. I didn't do it myself.

R. D. Q. 25. You were there all the time, you said?

A. In and out; yes.

R. D. Q. 26. Then you were not there all the time, you don't know what other officers told these men, or any one of them?

A. These men were not under constant questioning. I was present when they made their statements, except Emuil.

R. D. Q. 27. You had taken statements, and checked over from 10 o'clock at night, and finally got a statement that was satisfactory according to what you thought the truth was. That was after you sent for these defendants and brought them back down to your office?

A. We sent for the defendants and they were brought back for further questioning.

R. D. Q. 28. You repeatedly told them they were not telling the truth, until they made the statement that was satisfactory to you?

A. No, sir.

R. D. Q. 29. Did you finally get a statement that was satisfactory to you?

A. We got the statements as they gave them.

R. D. Q. 30. You finally got one that was satisfactory?
Mr. AULT. We object to that.

RE-CROSS-EXAMINATION

Questions by OTTO AULT, Esq.:

R. X. Q. 1. With reference to the question that was asked you about the statements, that they were lying or not telling the truth, I will ask you if these defendants at different times didn't themselves say that was a lie?

A. Yes, sir; repeatedly.

R. X. Q. 2. You agreed that it was, and then they would make another statement?

A. Yes, sir; they would say "that is all a lie, and now I will tell you the truth."

R. X. Q. 3. You state they would say that?

A. Yes, sir.

15 REDIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

R. D. Q. 1. What prompted them to say that?

A. I don't know their minds; I am not attempting to read them.

R. D. Q. 2. You told them, or other officers told them, what they had said was a lie?

A. No, sir.

RE-CROSS-EXAMINATION

Questions by OTTO AULT, Esq.:

R. X Q. 1. Who was doing the questioning?

A. Mr. Taylor did most of it, except the statement of Barney McNabb and Emuil McNabb; Capt. Larkins took those.

REDIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

R. D. Q. 1. Neither Mr. Larkins or Mr. Taylor are here?

A. Mr. Larkins is here.

Witness excused.

16 The witness, CLAUDE RICKETTS, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

Q. 1. What time did you get to the Federal Building on the morning of Aug. 1st?

A. It was before daylight.

Q. 2. Who did you find in custody when you got here?

A. Three of the McNabb boys.

Q. 3. Emuil, Raymond, and Barney?

A. It was not Barney, it was the other three.

Q. 4. Emuil, Raymond, and Freeman?

A. Yes, sir.

Q. 5. Where were they when you got here?

A. In that little lock-up.

Q. 6. Do you know how long they had been there?

A. No, sir.

Q. 7. You don't know whether they had been there all night, or not?

A. I have no idea.

Q. 8. That was before daylight?

A. Yes, sir.

Q. 9. On the morning of the first?

A. Yes, sir.

Q. 10. How long did they stay in this little room on the 1st day of August?

A. I cannot answer that.

Q. 11. Did you take them to the Hamilton County jail?

A. Not at that time; no.

Q. 12. Did anybody else have the right to take them, except you; any other officer?

A. I cannot answer that.

Q. 13. You, yourself, did not take them?

A. No.

17 Q. 14. Did you have occasion to go to the jail and get any of these prisoners and bring them back down here on the 2nd or 3rd?

A. No, sir.

Q. 15. Do you know what time these three defendants left the Federal Building and went to the Hamilton County jail?

A. Sometime in the afternoon.

Q. 16. Late in the afternoon?

A. Around 4 o'clock I guess.

Q. 17. Do you know who took them?

A. I took one to the jail that afternoon.

Q. 18. That is what I am asking you, what time you took them to the jail?

A. Around 4 o'clock.

Q. 19. They had been in this little room continuously from the time you saw them that morning?

A. I cannot say that; I think they were downstairs some.

Q. 20. They were in this building somewhere?
A. Yes, sir.
Q. 21. Do you know whether they had anything to eat during that time?
A. Yes, sir; they had sandwiches.
Q. 22. Who gave them to the defendants?
A. Some of the Alcohol Unit men.
Q. 23. Did you see that?
A. Yes, sir.
Q. 24. Did you see these three defendants get something to eat?
A. Yes, sir.
Q. 25. Emuil, Raymond, and Freeman?
A. Yes, sir.
Q. 26. Do you know what agent gave them food?
A. No, sir.
Q. 27. You didn't go back to the jail on the night of the 2nd and bring them back?
A. No, sir.
18 Q. 28. Do you know how they got down here, or how they got back to the jail?
A. I do not.
Q. 29. Is there any bed in this little room next to the Marshals' office?
A. No, sir.
Q. 30. Any chairs in there?
A. No, sir.
Q. 31. Any stool?
A. No, sir.
Q. 32. Nothing in there that you can sit down on or lie down on, except the floor?
A. No, sir.

CROSS-EXAMINATION

Questions by OTTO AULT, Esq.:

Mr. AULT. We have no questions.

Witness excused.

19 The witness, R. T. KITTS, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

Q. 1. Are you R. T. Kitts?
A. Yes, sir.
Q. 2. Are you connected with the Alcohol Tax Unit?
A. Yes, sir.

Q. 3. Did you take part in questioning any of these defendants?
A. I did.
Q. 4. Which ones?
A. I think practically all of them.
Q. 5. When did you first see Freeman McNabb?
A. On the first of August.
Q. 6. When did you first see Raymond McNabb?
A. On the first of August.
Q. 7. When did you see Emuil McNabb?
A. The 1st day of August.
Q. 8. Where were they when you saw them?
A. In the office of the Alcohol Tax Unit.
Q. 9. What time of the day was it?
A. It was the night of Aug. 1st—in the afternoon, around 8 o'clock, as I remember it.
Q. 10. Around 7 o'clock on Aug. 1st?
A. The three that you named. I believe Barney was there, too.
Q. 11. Did you talk to them then?
A. Yes, sir.
Q. 12. How long did you talk to them?
A. I don't remember.
Q. 13. What time in the night did you get through talking to them?
A. I don't remember that.
Q. 14. Was it late at night, or early?
A. Around 10 o'clock, as I remember that was on the 1st.
Q. 15. You got there with them about 10 o'clock?
A. 9 or 10 o'clock; I am not positive.
Q. 16. It could have been later?
A. I don't think later than 10 o'clock.
Q. 17. Had someone else been questioning them that afternoon, before you talked to them, or do you know?
A. No; I don't know.
Q. 18. Were they all here in the Federal Building at 7 o'clock when you questioned them?
A. That is the way I remember it, those three. We went to Jasper and got Barner out of the jail and Banjamin came in on the morning of the 2nd.
Q. 19. When you first started talking to them around 7 o'clock they were in the building, someone was there already questioning these three men, was there not, somebody talking to them when you came in?
A. No.
Q. 20. Were they there with the other agents?
A. As well as I remember, they were brought down from the jail.

Q. 21. You talked to them about three hours?

A. No; I didn't.

Q. 22. They were there in the office about three hours?

A. I don't know.

Q. 23. They got down there about 7 o'clock and were there until after 10?

A. If that is when they came down and were taken back, that would be true.

Q. 24. Did anybody try to see them while you had them down there?

A. No.

Q. 25. Did any relatives ask for the privilege of seeing them?

A. No.

Q. 26. Did you call any of these defendants a liar in the course of your questioning them?

A. No, sir.

21 Q. 27. You didn't tell any of them that he was not telling the truth?

A. I did not call him a liar.

Q. 28. What did you call them?

A. Well, we taken their statements there; we tried to get the truth out of them.

Q. 29. When they told something you didn't think was true you reminded them that it was not true?

A. I might have told them that couldn't be true.

Q. 30. You told them it couldn't be true, no use to tell you that?

A. Possibly so. I don't remember the exact words, but I did not call any of them a liar.

Q. 31. When you got another statement, you didn't tell them it was not the truth; that you knew it was not true?

A. I don't remember the exact words.

Q. 32. You did that time after time over a period of hours on August 2nd didn't you?

A. I questioned longer on August 2nd then on the 1st, especially Benjamin and Barney.

Q. 33. Now, did you talk to them any time on the morning of the 2nd of August?

A. In the afternoon, I believe it was.

Q. 34. You started talking to them in the afternoon?

A. Yes, sir.

Q. 35. What time in the afternoon?

A. I don't remember the exact time.

Q. 36. Was it the middle of the afternoon?

A. As I remember, around 3 o'clock; because we went back to the cemetery in the morning.

Q. 37. You took them down there on the morning of the 2nd, is that right?

A. No; I didn't. I took Barney down there.

Q. 38. The afternoon of the 2nd a bunch of other officer' had them in the room questioning them from around 3 o'clock on.

22 A. I don't remember the time.

Q. 39. You said it was sometime about the middle of the afternoon.

A. Yes, sir.

Q. 40. How long did you talk to them?

A. I don't remember.

Q. 41. Did you take them back to jail for supper?

A. No; we bought them some sandwiches and coco colas, several times, and cigarettes.

Q. 42. On the afternoon of the 2nd, you took them back to jail, after they had been brought down about the middle of the afternoon?

A. I don't believe I went with them, but they were taken to jail.

Q. 43. When?

A. Late in the evening.

Q. 44. You or others on the afternoon of the 2nd, some of the officers, reminded them they hadn't told the truth every once in a while; that they had not told the truth?

A. Yes, sir.

Q. 45. Some of their relatives asked to be permitted to see them and you wouldn't let them?

A. I did not.

Q. 46. Yet you were not satisfied and sent back to the jail and got them out of bed about 10 o'clock at night, on the night of the 2nd?

A. They were back that night of the 2nd; I believe about 10 o'clock.

Q. 47. They didn't come down there by themselves, voluntarily.

A. No; they were in jail.

Q. 48. They didn't call you up and tell you they wanted to come down and talk?

A. They were confined in jail.

Q. 49. You sent and got them out about 10 o'clock and kept them there until about 2 o'clock in the morning of the 3rd, didn't you?

23 A. We kept them until after midnight; I don't remember when.

Q. 50. Did you finally persuade what you thought the truth was?

A. They made a statement.

Q. 51. They finally made a statement, and those statements were acceptable to you, and you took them back to jail about 2 o'clock in the morning?

A. They swore to that; part of them did; not all of them.

Q. 52. Did you question them any more after that practically all night session on the 3rd?

A. It was not an all-night session. I didn't question them any more. I don't know whether anybody else did or not.

Q. 53. You did continuously, or you officers did, told them they were not telling the truth, or what you insisted was the truth?

A. No, sir.

Q. 54. And they would make some statement, you would tell them that it was not true?

A. Possibly so.

Q. 55. You had previously decided what was the truth?

A. (Witness does not answer.)

Q. 56. That is right?

A. I did not make all of the decisions.

Q. 57. When they finally made a statement satisfactory to you, you took them back and let them go to bed?

A. I didn't take them baerk.

Q. 58. You sent them back; you or some other officer?

A. (Witness does not answer.)

Q. 59. Did you tell Raymond McNabb you would knock him out of the chair with a book if he didn't stop lying to you?

A. No, sir.

Q. 60. Did you wave a book in his face?

A. No, sir.

Q. 61. How many of you officers were there from 10 o'clock until 2 o'clock in the morning with these 4 or 5 boys talking to them and asking them questions?

A. I couldn't be positive of that.

24 Q. 62. How many were there?

A. At least six.

Q. 63. These boys had no lawyer there, had no relatives there, had no friends there, is that right?

A. Well, they didn't have any enemies there.

Q. 64. Nobody except some nice people trying to persuade them they were not telling the truth?

Mr. Ault. We object to that.

A. They were instructed to tell the truth.

By Court. The Court is hearing this testimony, no jury here.

A. I want to make this statement, they were told all the time to tell the truth and nothing but the truth, that all we wanted was the truth.

Mr. BAKER:

Q. 65. But the truth was what you thought it ought to be and not what they thought, was it not?

A. We knew what the truth was.

Q. 66. You wanted them to agree that what you finally got was correct?

A. (Witness does not answer.)

Q. 67. Is that right?

A. No.

Q. 68. You officers were all pretty sore because another officer had been killed, and you were prejudiced in the matter?

A. I was not sore.

Q. 69. You didn't feel good about it?

A. Naturally, I did not.

Q. 70. You wanted the man disposed of who did it?

A. I wanted justice to be meted out to the man who did it.

Q. 71. Did these boys have anything to eat between 10 o'clock and 2 o'clock?

A. Yes, sir; they were treated with every courtesy; we insisted that they eat.

Q. 72. Did any of them get sick from eating too much?

A. I don't know.

25 By COURT. That may be pertinent, but the Court cannot see it.

Witness excused.

The witness, JAMES T. JAKES, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

Q. 1. Mr. Jakes, you are with the Alcohol Tax Unit?

A. Yes, sir.

Q. 2. Where are you stationed?

A. At Knoxville, Tennessee.

Q. 3. Did you take any part in questioning any of these defendants?

A. I was in and out of the room at times, but I didn't do any questioning.

Q. 4. On what occasion did you hear anyone questioning the McNabb boys?

A. I couldn't say; I think it was the night of Aug. 1st.

Q. 5. What time in the night was it?

A. Well, the first part of the night, on the first occasion, possibly 6 or 7 o'clock.

Q. 6. That was here in this building?

A. Yes, sir.

Q. 7. Who was being questioned at that time; which one?

A. I don't know. They brought the defendants in one at a time, several times, I don't know which one was brought in first, or anything about that.

Q. 8. Where did you find them when they were brought in?

A. They were brought from the county jail.

Q. 9. What time did they start bringing them down?

A. It was in the afternoon of August 1st.

Q. 10. What time in the afternoon?

26 A. I couldn't say when they first started bringing them down.

Q. 11. Was it along about the middle of the afternoon?

A. Possibly; yes, sir.

Q. 12. When did you take them back?

A. They would be brought in, be questioned possibly at various times, some of them half an hour or maybe an hour, or maybe 2 hours.

Q. 13. You didn't take them back and forth to the county jail each time, did you?

A. Yes, sir.

Q. 14. What time did the defendants go back to the county jail on the night of August 1st?

A. It was late at night.

Q. 15. About 12 o'clock?

A. That is probably right; somewhere around that hour.

Q. 16. You had brought them down about 3 o'clock in the afternoon?

A. Not all at the same time; various ones at different times during the day and night.

Q. 17. In other words, the officers had been questioning them all of that day from about 3 o'clock in the afternoon, until about 12 o'clock that night?

A. Yes, sir.

Q. 18. You don't know which ones they were working on at any particular time?

A. No, sir.

Q. 19. Was it later than 12 o'clock that they took the last one back?

A. I doubt that; but it was around midnight.

Q. 20. When you first saw them on the morning of the 2nd?

A. The best I recall, somewhere around 10 or 11 o'clock in the morning.

Q. 21. Did you bring these defendants back then?

A. Not at the same time. I was not the only one who
27 brought them down, other officers would get them and take them back. I did not bring them every time.

Q. 22. You were taking them back and forth from about 10 o'clock on the 2nd of August?

A. Yes, sir.

Q. 23. You brought them down here in the morning, and the afternoon, and at night?

A. As I recall, they were questioned during the day.

Q. 24. Questioned continuously from 10 o'clock?

A. No, sir; not continuously.

Q. 25. Well, off and on all day?

A. They stopped for lunch, and every now and then would have coca colas brought in and rest a while.

Q. 26. Did they have to have rest?

A. We would get hamburgers, and eat them.

Q. 27. You had to have rest?

A. We had to have something to drink.

Q. 28. You and the other officers had to have rest?

A. Apparently.

Q. 29. You got very tired?

A. Yes, sir.

Q. 30. You got very tired about 12 or 1 o'clock on the morning of the 3rd of August, didn't you?

A. To the best of my recollection I don't think they were questioned on the 3rd. That was Saturday morning, I think they were questioned until somewhere around midnight, to the best of my recollection.

Q. 31. It ended on the 2nd?

A. That is my recollection.

Q. 32. Was it not a fact that it was after 1:30 or around 2 o'clock when you finally got through?

A. It could have been, but to the best of my recollection it was around midnight.

Q. 33. The officers were very tired?

28 A. I didn't say we were tired.

Q. 34. You officers did get very tired.

A. No, sir; I wouldn't say that.

Q. 35. You had to stop to rest?

A. We stopped for refreshments; yes, sir.

Q. 36. Where were you at 9 o'clock on the morning of the 1st, when you took no part in questioning them, I believe you say?

A. No, sir.

Q. 37. What time on the 1st did you come into the case?

A. Somewhere around 8 o'clock on the morning of the 1st. I arirved a little late on account of a matter that does not concern this case.

Q. 38. You were an outside man bringing them back and forth?

A. I was on the job.

Q. 39. I will ask you if some of the defendants' family, wives, mothers, fathers, didn't come and ask to see them and you turned them away?

A. No one asked to see them; they didn't ask me.

Q. 40. You did see some of them around the entrance to the room?

A. The only party I remember seeing was the mother of Benjamin, she was around the building somewhere; I don't remember where I saw her. She didn't talk to me as I remember, right now.

Witness excused.

29 The witness, R. E. BURKE, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

Q. 1. Is this R. E. Burke?

A. Yes, sir.

Q. 2. Are you connected with the Alcohol Tax Unit?

A. I am.

Q. 3. When did you first arrive to start work on this particular case?

A. On August 1st, about 8 o'clock.

Q. 4. Where did you report to?

A. To the Chattanooga office here.

Q. 5. Who did you contact?

A. Eventually, Capt. Beman.

Q. 6. Did you seen any of these defendants shortly after you got there?

A. No, sir; no shortly.

Q. 7. When was the first time you saw any of them?

A. The first I saw any of them was on the evening of Aug. 1st.

Q. 8. Where were they then?

A. At the Federal Building.

Q. 9. Were they being examined then by various officers?

A. They were.

Q. 10. What time of the day did you see them?

A. In the evening, around 6 P. M.

Q. 11. Did you participate or help in the examination?

A. I made notes of it; I didn't ask questions.

Q. 12. Who was doing the questioning?

A. Mr. Taylor.

Q. 13. How long did he question these various defendants the afternoon and night of August 1st?

A. I am not sure about the time.

Q. 14. Approximately how late at night did you get through?

30 A. I believe it was around 11 o'clock.

Q. 15. Various defendants had been examined continuously or intermittently from about 6 to 11 the night of the first?

A. Yes, sir; different defendants at different times.

Q. 16. Did you hear anybody, when they made a statement not satisfactory to Mr. Taylor, did you hear him remind them it was not true?

A. The defendants were informed by Mr. Talyor that we were in possession of the true facts; yes, sir.

Q. 17. When they made a statement that did not correspond to what Mr. Tayler knew to be the true facts, he would remind them that their statement was not true?

A. He did.

Q. 18. He continued to remind them of that until 11 o'clock that night, and then sent them back to jail?

A. They were taken back to the county jail after questioning.

Q. 19. When were they brought back the next morning?

A. I don't remember the exact time, it must have been after 9 o'clock.

Q. 20. Between 9 and 10 o'clock.

A. Yes, sir.

Q. 21. How long were they kept there on the morning of the 2nd, being questioned?

A. As I remember, they were not all brought at one time, and not all returned at the same time. They were questioning them all during the morning.

Q. 22. And during the afternoon?

A. Some during the afternoon.

Q. 23. Did you take them back to jail on the evening of the 2nd, around supper time?

A. I didn't.

Q. 24. Were they taken back?

A. I believe so; yes, sir.

Q. 25. What time on the night of the 2nd were they brought back?

31 A. At various times, brought back at different times. I went after some of them around 9 or 10 o'clock.

Q. 26. At night?

A. Yes, sir.

Q. 27. You woke them up, got them up out of bed?

A. I don't believe they were in bed; I didn't see them in bed.

Q. 28. You just took them to the jail and brought them back?

A. That is right.

Q. 29. You talked to them until about 2 o'clock on the morning of the 3rd, did you not?

A. I don't know. It was late.

Q. 30. Considerably after midnight?

A. Yes; I believe it was.

Q. 31. Probably around 2 or 3 o'clock in the morning?

A. It could have been.

Q. 32. By that time Mr. Taylor had convinced these boys that the true facts were as he knew them all the time?

A. Yes, the boys told the truth.

Q. 33. About 2 o'clock on the morning of August 3rd, was anybody present, any friend, any lawyer, any advisor present when any of these five men were being questioned, except Federal Officers?

A. There were relatives of these boys in an adjoining room. I don't believe the boys asked for anybody to come; I don't believe there is anybody in there except officers.

Q. 34. Do you know whoever was in charge refused to let any of these defendants's relatives come in while they were being questioned?

A. No, sir; I don't know that.

Q. 35. At one time didn't you, yourself, when Emuil McNabb started to reach over and take his baby out of his wife's arms, didn't you compel him to sit down or go on?

A. No, sir.

Q. 36. You didn't do that?

A. No, sir.

32 CROSS-EXAMINATION

Questions By Otto Ault, Esq.:

X Q. 1 Did you ever at any time offer any of them any reward?

A. No, sir.

X Q. 2. Did you ever hear any other officer do that?

A. No, sir.

X Q. 3. Did you see any indignity offered to any of these defendants?

A. No, sir: I did not.

(Witness, excused.)

33 The witness, JERALD P. LEVY, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

Q. 1. Are you connected with the Alcohol Tax Unit?

A. Yes, sir.

Q. 2. Were you so connected back in August and July of this year?

A. Yes, sir.

Q. 3. When were you first directed to take any part in this particular case?

A. Mr. McKinney, Investigator in Charge, called me at my residence about 2:00 o'clock on the morning of August 1st.

Q. 4. Where did you go then?

A. I went down to the office of the Alcohol Tax Unit.

Q. 5. What did you find when you got there?

A. I think Mr. McKinney was there, and Mr. Abrams.

Q. 6. Had any of the defendants been taken into custody at that time?

A. No, sir.

Q. 7. How long before you first saw any of them?

A. I saw the first defendant, Barney McNabb, early in the morning, after daylight, at the Marion County jail.

Q. 8. You went and got him?

A. Yes, sir.

Q. 9. You brought him back here?

A. Yes, sir.

Q. 10. Were you present when any of these defendants were examined?

A. Yes, sir; I was.

Q. 11. When was the first time you were present when the examination was going on?

A. The morning after I brought Barney in.

34 Q. 12. That was on the second of August?

A. That was the first of August.

Q. 13. The first of August was the day after the shooting happened?

A. Yes, sir; we brought Barney in to the county jail on that morning.

Q. 14. How long had you been here with him?

A. I don't know exactly.

Q. 15. Who was doing the examining?

A. Mr. Kitts.

Q. 16. Do you know how long he examined Barney McNabb?

A. I would say definitely, no, sir.

Q. 17. Was it an hour or two?

A. I wouldn't say more than that; maybe thirty or forty minutes.

Q. 18. Were you present when any of the other McNabb boys were examined?

A. I believe I was during part of the time when they were talking to Benjamin.

Q. 19. Were you present when Emuil, Raymond, and Freeman were examined?

A. I was in and out. I didn't hear much that they said. Some of the time I didn't know who they were examining.

Q. 20. You were in and out?

A. Yes, sir.

Q. 21. Did you hear Mr. Taylor and others examine these defendants during the day of the 1st of August?

A. Yes, sir; I believe I did; I don't remember which one it was.

Q. 22. Did they examine them on the night of the 1st?

A. No, sir; I was not present at any night session at all.

Q. 23. You were not present at the night session on the 2nd and 3rd of August?

35 A. No, sir.

Q. 24. Did you hear Mr. Taylor tell any of these defendants they were lying?

A. No, sir; I did not hear that statement at all.

CROSS-EXAMINATION

Questions by OTTO AULT, Esq.:

Mr. AULT. No questions.

(Witness excused.)

36 The witness, SAM MCKINNEY, having first been duly sworn, testified as follows:

Direct Examination by E. B. BAKER, Esq., of Defense Counsel:

I questioned Raymond and Barney McNabb, part of the time, on the morning of August 2nd. Benjamin McNabb voluntarily came into the office of the Alcohol Tax Unit and stated he wanted to make an explanation of his whereabouts on the day before. I am not sure whether I questioned Raymond or not. I heard him questioned by other officers some of the time, but I was not there all the time. I was not present at the night session of August

2nd and 3rd, but I was present in the morning of August 1st about 10 or 11 o'clock at which time we talked to one or the other of them the greater part of the day up and into the night. I didn't see them anywhere except in the office and we did not talk to them continuously, but often at different times. I did not tell them they were not telling the truth and I did hear Mr. Taylor tell them they were not telling the truth on one or more occasions. I never heard Mr. Taylor tell the defendants that if they would tell the truth it would be easier on them. I asked them to tell the truth and nothing but the truth. I have never told Barney McNabb it would be lighter on him if he told the truth or harder on him if he didn't tell the truth. There was no one in the room with Barney and Benjamin during this questioning except Alcohol Tax men.

Cross-examination by OTTO AULT, Esq.:

Benjamin McNabb came to the Alcohol Tax Office voluntarily sometime before noon on the morning of August 2nd and said that he wanted to make an explanation of his whereabouts, and his statement was written down. Later he was confronted with the statements made by the other boys, in which the other boys had accused Benjamin of firing both shots. Benjamin thereupon said, "If they are going to accuse me of that, I will tell the whole truth, you may get your pencil and paper and write it down." I did not offer them any immunity or reward for making this statement, nor did I offer them any kind of abuse, nor did anyone else while I was present.

Redirect examination by WILKES T. THRASHER, Esq., of Defense Counsel:

I think Mr. Taylor, Mr. Beman, possibly Mr. Larkin and Mr. Burke were present when Benjamin McNabb made his statement. There were no lawyers or anyone else with him except alcohol tax men.

The witness, Mrs. ARCH McNABB, having first been duly sworn, testified as follows:

Direct examination by J. M. C. TOWNSEND, Esq., of Defense Council:

I am Mrs. Arch McNabb and I am the mother of these boys—Raymond, Emuil, and Freeman, who were brought over here between one and two o'clock in the morning on August 1st. Between 9 and 10 o'clock that same morning I tried to visit the boys, first at the jail and then in the basement at the Federal Building where the boys were being questioned. No one would

let me see them and the man who had them ordered me out of the room. One of my daughters, my husband, and Mr. Pinkerton were with me.

39 The witness, HERMAN PINKERTON, having first been duly sworn, testified as follows:

Direct examination by J. M. TOWNSEND, Esq., of Defense Counsel:

I think the office of the Alcohol Tax Unit is down stairs in this basement. I know all the defendants and Mrs. Arch McNabb, mother of Freeman, Raymond, and Emuil McNabb. I came to this building on the morning of August 1st with Mrs. Arch McNabb when she tried to visit her sons. We first went to the jail and Chief Brown told us they were down here and we came down here. I believe I knocked on the door, anyway we went in and an officer told us that we could not talk to them until later on. That was all there was to it.

40 The witness, Mrs. ——— McNABB, having first been duly sworn, testified as follows:

Direct examination by WILKES T. THRASHER, Esq., of Defense Counsel:

I am Mrs. McNabb and on August 1st I learned the Government wanted my son so the next morning I brought him in to the basement of this building, I think to the office of the Alcohol Tax Unit where I met some officers who came out there and ordered him in. At first they let me in but I didn't hear them talk to him to amount to anything. They ask me if he had bullets holes or shots in him. They wouldn't let me stay in there, they asked me to get out and I wasn't there when they questioned him.

Cross-examination by OTTO AULT, Esq.:

My husband was with me on the occasion and they made us stay in an adjoining room where we stayed until they took him back to jail.

Redirect examination by WILKES T. THRASHER, Esq.:

My husband and Lawrence and Jim Massengale were with me.

Re-cross-examination by OTTO AULT, Esq.:

I did not see my boy off and on during the day after they put me out until they took him to jail. I stayed there about five hours; it might have been longer than that; I wouldn't say exactly.

41 The witness, EMUEL McNABB, having first been duly sworn, testified as follows:

Direct examination by J. M. C. TOWNSEND, Esq., of Defense Counsel:

I was arrested about one o'clock in the night on the morning of August 1st and put in a pen up here along with my brothers, Raymond and Freeman. We arrived at the Federal Building about three o'clock in the evening, and we stayed there all day. I was not questioned until five o'clock on the night of August 1st and when they took us from the office up to the jail. From the pen they took us to the Alcohol Tax Unit office where I was kept three or four hours, until somewhere around nine or nine-thirty at night. I don't remember who talked with me during that time. The officers threatened and called me a "wise hill-billie mountain son-of-a-bitch;" this was on the night of August 2nd. They didn't call me anything the first night, but on the second night they said I had talked to some damn lawyer and that was the reason I didn't talk, but said I was trying to make a damn fool out of wise people and then about 9:30 they took me back to jail. About 11 o'clock at night on the 2nd they woke all five of us up and brought us back down to the Federal Building and kept us until about 4 in the morning. They didn't ever question us any more after this. The first time we were brought down here at 5 o'clock and kept until 9:30, we didn't have anything to drink, nor no water to drink and they wouldn't let us send out after any. I don't know any of these men personally, but I might know them if I saw them. They never threatened to strike me nor I never heard them threaten to strike any of the others. They just called me a damn liar a good many times. I do not know Mr. Taylor, but I know Mr. Levy when I see him. I think Mr. Beman told me I was

42 nothing but a "wise hill-billie son-of-a-bitch, trying to make a fool out of educated people like them." They never told me at any time they were questioning me that I was entitled to have a lawyer, nor that anything that I said might be used against me. They did tell me that if I told the truth it would be lighter on me. They did not say they would help me nor anything about making bond, but Mr. Jones asked me if I was under parole, that if I was they might put me in the electric chair. I didn't tell them I was up there. I have lived in that settlement over there all my life, I went to school at Kelley's Ferry as far as the second grade. I am twenty-two years old and the furtherest I have been away from home is Stevenson, Alabama. I don't know how far that is but I expect about two hundred miles.

Cross-examination by Otto Ault, Esq.:

Mr. Beman talked pretty rough to me, called me a wise hill-bill'e son-of-a-bitch and said they might put me in the electric chair.

43 The witness, Freeman McNabb, having first been duly sworn, testified as follows:

Direct examination by J. M. C. Townsend, Esq., of Defense Counsel:

I am Freeman McNabb and 25 years old. I am one of the defendants and I was arrested about 1 o'clock in the morning on the 1st of August. They brought me here and put me in a cage in the Marshall's office about 2:30 or 3 in the morning where I stayed until late that evening when they took me down to the basement and questioned us and then took us to jail, where I stayed about an hour and then they brought me back and Mr. Taylor and some other man talked to us until about 11 o'clock that night when they took me back to the jail. They brought me back two or three times, some in the afternoon and some at night. On August 2nd I was brought back about 7 o'clock and kept until long after midnight when they took me back to jail. The next night they brought all of us together at about 11 o'clock at night. They came to the jail and woke us up and kept us until three or three-thirty in the morning. On the 1st day they kept us in a cage and didn't give us anything to eat or drink. The second time they brought us down at 5 o'clock and kept us until 11. We didn't have anything to eat; Emuil wanted to send out and get something to eat and they wouldn't let him. During this time they threatened to slap me on one occasion and one officer said I was crazy and yellow and was a big pile of manure in my neighborhood. I reckon he told me that because he said I was lying. He called me a liar a great number of times, I never counted how many, nearly every time I said anything he would say it was a damn lie. No one ever read a warrant to me and I don't know when it was sworn out, I don't know whether there was a warrant for me when they questioned me from 5 till eleven, nor when they questioned me from 11 till two in the morning.

44 No one ever told me there was a warrant issued for me, and no one ever told me I could have a lawyer nor that the statements I made might be used against me. They told me if I would tell the truth they would make it lighter on me and let me make bond. Mr. Taylor seemed to be in charge of my questioning although there were five or six others around there. However, none of my family was present, nor none of my friends. I lived in the community 25 years and went through the 4th grade

at school at Kelley's Ferry. The furtherest I have ever been from home is to Jasper, which is about twenty-one miles. One time they threatened to knock me out of my chair with their fist and Mr. Taylor was present and never said anything, but they didn't hurt me.

Cross-examination by OTTO AULT, Esq.:

Neither of the men who have been on the witness stand threatened to knock me out of my chair, he was a curly-headed man, but I don't know who he was. Mr. Taylor repeatedly told me that I was a damned liar. No one ever offered us anything to eat; no one offered us coffee, coca colas, or anything. We offered to buy something and they wouldn't let us. When I tried to tell them anything they would say it wasn't right and I was never warned of my rights nor never told that I could make a statement or not make it. I have been in court once before, but I didn't have to make any statement; I just plead guilty; this time they said I had to make one.

Redirect examination by J. M. C. TOWNSEND, Esq.:

When I plead guilty it was for manufacturing whisky. Mr. Wilkes, Thrasher represented me at that time.

45 The witness, BARNEY MCNABB, having first been duly sworn, testified as follows:

Direct examination by J. M. C. TOWNSEND, Esq., of Defense Counsel:

I am Barney McNabb, one of the defendants. I found on the morning of August 1st at 5 o'clock that I was wanted by the authorities. Mrs. Arch McNabb and my wife told me about it. I went over to Jasper and later I was brought to this building by the Federal authorities at about 9 or 10 o'clock, where I was taken downstairs somewhere where there were seven or eight men. The only two of them I knew were Mr. Kitts and Mr. Levy; I didn't see Mr. Taylor that morning. They questioned me about two hours that morning and then took me out to the cemetery, then they brought me back and questioned me some more for an hour, then they took me to the county jail and didn't bring me back any more that day. About 8 or 9 o'clock the next morning they brought me down here and kept me until noon and then took me back to the jail where they left me until the next day, the third morning. On August 2nd I was brought down about 8 o'clock, and on the night of August 2nd about 8 or 9 o'clock, and they came to the jail and got me and kept me until 10 or 11 o'clock before I was taken back. The last time they brought me

down they came to the jail about 11 o'clock at night and got me and kept me until two or three o'clock in the morning. On the first morning Mr. Kitts told me that if I didn't tell the truth he would burn me up, but it I did tell the truth he would make it lighter on me; they told me that several times. Mr. Taylor
46 hit me over the head with a book one time and Freeman was sitting right beside me when he did. He did that when he called me a liar and I said I was not and he said he knew I was. Before he hit me he called me a son-of-a-bitch and said I was yellow and he told an officer to take me back to the jail and let me stay there until I rotted because he knew I hadn't told the truth.

I am 28 years old and have lived in the McNabb settlement 28 years. I have been as far as Jasper once or twice and went to the third grade in school.

Cross-examination by OTTO AULT, Esq.:

Mr. Ament arrested me in front of Jim McNabb's place on the highway and carried me to the Marion County Jail where Mr. Ricketts, Mr. Levy, and Mr. Kitts came and got me. They brought me to room in the basement of this building and then they took me back out to the cemetery. I didn't volunteer to go, they just took me. They handcuffed me and kept me handcuffed all the time. I didn't tell them nothing; Mr. Kitts told me he would burn me up on the morning of the first, that was the first time they talked to me, and that if I told the truth he would make it light on me. He told me this several times. Mr. Taylor called me a son-of-a-bitch and hit me with a book, something like lying on your desk, he had it rolled up. It hurt alright but, of course, I couldn't have done anything about it if he killed me. They didn't arrest me; I just surrendered out on the road of Jim McNabb's house because I had word they wanted me and just came out there.

Redirect examination by J. M. C. TOWNSEND, Esq.:

I spent the night at Chester McNabb's house across the river, he told me that Mr. Ament was waiting for me over at Jim McNabb's and I found him there and went with him.

47 The witness, RAYMOND MCNABB, having first been duly sworn, testified as follows:

Direct examination by J. M. C. TOWNSEND, Esq.:

I am Raymond McNabb, twin brother of Freeman McNabb, and I was taken into custody by Federal Officers on the 31st of July at one or two o'clock in the morning, that was really the first of August because it was after midnight. I am twenty-five

years old, having lived in the McNabb settlement twenty-five years and went to the fourth grade in school. The farthest I have ever been away from home is around Jasper. I was brought here and put in that detention room on the morning of August 1st at about 2 o'clock and kept there until five o'clock that afternoon and during that time I did not have anything to eat. No one questioned me that day but I was taken down to the basement and finger-printed. I didn't make an effort to get anything to eat but my brother did; he tried to get them to get something for all of us to eat. He asked an officer and the officer said we couldn't have anything. After I was finger-printed I was taken to the jail where I was kept until eleven o'clock at night and where I had a cheese sandwich to eat. That same night about 10 or 11 o'clock I was brought back down here and kept until between two or three and during that time five or six men questioned me. Mr. Taylor told me he would knock me out of my chair if I didn't tell the truth and that he knew what the truth was and that everything I had told him was a lie. He told me that if I told the truth I could get bond and he would make it light on me. He called me a liar several times, pretty often as a matter of fact, and said I was just telling a God-damn lie. He didn't call me any names however or hit me with anything, but he had a book which he swung around my face pretty often.

There was no one there with me except the federal officers.

48 Cross-examination by J. B. FRAZIER, Esq., District Attorney:

I have never been any further away from home than Jasper, Tennessee, but I have been in Chattanooga a good many times and that is as far as I have ever been away from home. I was in Federal Court in January of 1938 when I entered a plea of guilty. The best I remember Mr. Taylor was big fat chunky man and I was never warned of my constitutional rights. None of the defendants were with me and I never made any statement and I don't know anything about what my brother was going to swear to. I don't know who the man was who threatened me except he was a Government man. I don't know whether I have ever seen him around Court or not, nor do I know whether I would know him if I should see him. My brother asked him could he send out and get something to eat and the man said that wasn't allowed. On the first day I was finger-printed in the afternoon and then taken to jail where I received a cheese sandwich and was questioned the first time that night about 10 or 11 o'clock. I was then taken back to jail about two or three o'clock the next morning.

Redirect examination by J. M. C. Townsend, Esq.:

I had a cousin by the name of Raymond McNabb over in that community but he is now dead, it is about twenty-one miles from my home to Jasper and twelve miles to Chattanooga.

49 Benjamin McNabb, having first been duly sworn, testified as follows:

Direct examination by Wilkes T. Thrasher, Esq., of Defense Counsel:

I am Benjamin McNabb, one of the defendants, and I am twenty years old. I have lived in the McNabb community all my life, went to the fourth grade in school, and have never been arrested before in my life. I was arrested on August 2nd, when I came to this courthouse after I received word they wanted me. I first talked to the Government man on August 2nd in the basement of this building when they questioned me for about five or six hours. I didn't have a lawyer with me, a friend, or a relative, and they never told me that I was entitled to a lawyer; neither did they tell me that what I said would be used against me. They cursed me and told me I was telling a God-damn lie. I don't know who the man was, but there wasn't anyone there except Government men, and they made me take my clothes off because they wanted to look at me. This scared me pretty much. They also told me that they knew what the truth was, and I wasn't telling it, and that if I told the truth they would make it lighter on me, but if I didn't they would burn me up in the electric chair. The fartherest I have been from home is Jasper, Tennessee, and to Chattanooga, which is closer than Jasper. They brought me back that night about eleven o'clock and took me back to the jail about two o'clock in the morning.

Cross-examination by J. B. Frazier, Esq.:

My mother and father came with me on August 2nd and stayed in another room. I didn't tell the officer that I wanted to make a statement but merely told them that I came in because I heard they wanted me, had been looking for me, and told my mother to have me come in. When I first came in I sat with my mother and father ten or fifteen minutes and then was taken into another room, where the officer cursed me.

50 However, I don't know which ones did, and I was scared. I don't know which one said he would burn me up and have me hung. I was scared so bad I didn't know what to do. No one ever took me across the street to get me something to eat. They did stop in a restaurant on the way to jail, and I had something to eat and played a pin-ball machine. This was some time about

three o'clock, and I was not handcuffed. This was on the second day after I came in when they took me to jail and then brought me back the same night.

51 The witness, R. S. ABRAMS, recalled by counsel for defendants, and upon further examination, testified:

Re-cross-examination by E. B. BAKER, Esq.:

I filed complaints against these defendants, I don't know why the names of Emuil McNabb and Barney were written in with Ben. I don't think it was on the complaint when it was first taken out, but was added some time later. The complaint was taken out in the afternoon of August 2nd.

52 The witness, H. B. TAYLOR, having first been duly sworn, testified as follows:

Direct examination by J. B. FRAZIER, Esq.:

I am H. B. Taylor, District Supervisor, Alcohol Tax Unit, Bureau of Internal Revenue, with Headquarters in Louisville, Kentucky. On July 31 I received a call to come to Chattanooga and investigate the death of Mr. Leeper, a member of the Alcohol Tax Unit. I left Louisville about midnight and arrived here in the early morning of August 1st when I questioned four of the defendants and talked to one of them a few minutes. I talked to Barney McNabb first at the scene of where this occurred on the morning of August 1st. That evening after dinner I started questioning them at around 9 o'clock. I told each of them before they were questioned that we were Government Officers, what we were investigating, and advised them they did not have to make a statement, that they need not fear force, and that any statement made by them would be used against them and that they need not answer any questions asked unless they desired to do so, and I asked each of them if the understood that. I talked to each of them individually and each of them said they so understood. I told them that if they did answer the question to tell the truth, but that they had a right to refuse to answer if they wished. After they understood what I had told them I then proceeded with the questioning. I never called any of the defendants a damn liar, I did tell one or two of them they were lying to me. I told Freeman that he was, he told me first that he went to bed at 2 o'clock in the afternoon, on a hot day and slept until the next morning. I let him tell his entire story, that was his story, that he went to bed at 2 o'clock in the

53 *in the* afternoon and did not get up until the next morning when he was arrested. He said if any shot gun shots had been fired he did not hear a single shot. That was so un-

reasonable I told him that he was lying and he later said that he was. Several times when I was present during the questioning, when he was placed with his brother and cousin he would admit he lied about a particular point and would change his story but I didn't call any of them a damn liar. I never did anything to intimidate any one of them during the questioning, I did not hit anybody with anything, I have never threatened or abused any defendant in my life and I have been in the law enforcement work fifteen years. I never called any of them a smart-hill-billieson-of-a-bitch nor a manure pile. I do recall that in talking with Barny I said that any man or group of men who would hide in the dark and shoot another man, Government officer or any other person, with a shot gun was yellow. I told them on several occasions that they were not telling the truth because their confessions did not fit with the physical facts, and statements of their own crowd and we would put two of them together they could not reconcile their differences. They were brought down from the jail several times, how many I don't know. They were questioned one at a time, as we would finish one he would be sent back and we would try to reconcile the facts they told, connect up the statements they made, and then we would get two of them together. I think at one time we probably had all five together trying to reconcile their statements. This was along the last of the questioning and at this time they discussed the whole affair among themselves. I don't recall any requests by any of their people to see them, and I don't know that any of them were in the room or where they were. I know that on several occasions we sent out and got sandwiches and coca-cola and on one
54 or more occasions I sent them across the street with an officer to buy what they wanted and I know that Captain Beman did the same thing.

Cross-examination by E. B. BAKER, Esq.:

I have been with the Alcohol Tax Unit since 1929 and have been District Supervisor for two years and assistant for four years and have been in executive capacity for six years. I have been dealing with various types of crime since 1929. On the morning of August 1st when I arrived in Chattanooga and went to the cemetery and made an examination at the scene of the killing. That this was about 9 o'clock in the morning and I stayed out there about two hours and got a picture of the scene of the crime. I questioned Barney that morning at the cemetery and again that night about 9 o'clock in the Post Office Building. I sent to the jail for them and didn't know whether they were asleep or not, but it is not unusual to get defendants out of bed when you are trying to solve a crime as quickly as you can and if we can get them at night we do so. We are interested in getting the truth

about it while it can be gotten. I probably could have gotten the truth later but it seems to me a man knows more about what he did immediately afterward and will be more apt to tell the truth about it than at any other time. None of the defendants had an opportunity to talk with their families or to a lawyer. The reason we questioned the defendants at night was because we wanted to know as much about the case as possible before questioning them and it was sometime before we got to them. They were questioned until about 1 o'clock in the morning and then sent back to the jail as far as I know. I am sure we offered them something to
55 eat that night because I had not slept for two nights and was hungry myself and every time we sent out for something we offered it to them. I am sure they did eat some sandwiches and it is absolutely untrue that we officers sat around eating sandwiches and did not offer them any. I don't recall whether they ate or not, I wasn't interested in that particularly, they could have if they wanted to and we told them on different occasions that if they wanted anything they could send for it. I had them back down the next day, probably about nine or nine-thirty.

We had them back and forth most of the day. I questioned four of them separately practically all day. On the night of the second we had them all for a short time all together not over an hour. We had Freeman McNabb on the night of the second for about three and one-half hours. I don't remember the time but I remember him particularly because he certainly was hard to get anything out of. He would admit he lied before and then tell it all over again. I knew some of the things about the whole truth and it took about three and one-half hours before he would say it was the truth, and I finally got him to tell a story which he said was true and which certainly fit better with the physical facts and circumstances than any other story he had told. It took me three and one-half hours to get a story that was satisfactory or that I believed was nearer the truth than when we started. When I knew the truth I told the defendants what I knew. I never called them damn liars, but I did say they were lying to me. I had Benjamin McNabb take his clothes off to see if there were any kind of marks on him. We only had him take them off one
56 *one* time, I think that was on the morning of the second and he only had them off about two minutes. There were two or three officers besides myself at the time and there were no marks on him. I didn't have the other boys take their clothes off at all. I did not walk around him nor parade him around. I had him turn around with his back toward us as we couldn't see both sides at once. I didn't tell Barney McNabb that anyone would shoot a man under those circumstances was a yellow son-of-a-

bitch. I did tell him that any person or group of persons who would hide and shoot an officer or any other person with a shot gun was yellow. I did not have a book in my hand at any time, but I did have carbon copies of sworn typewritten notes and I had my personal notes. It would be impossible to tell all the motions I made with my hands during the two days of questioning, however, I didn't threaten anyone. None of the officers were prejudice towards these defendants nor bitter toward them. We were only trying to find out who killed our fellow officer. At no time during the questioning was any of their family there and they had no counsel present.

Cross-examination by WILKES T. THRASHER, Esq.:

I questioned Loomis Montgomery and some other man, I don't recall his name besides the McNabb boys. I questioned nearly everybody in the McNabb section, men and women, everybody I thought I might get information from. I talked to at least twenty people, some of whom were at the Federal Building. I also questioned Louis Davidson and at least one or more men named McNabb, one of whom was Lawrence McNabb.

57 Redirect examination by J. B. FRAZIER, Esq.:

I was present during nearly all the questioning. I did practically all the questioning except Freeman and Raymond. I talked with Barney out at the cemetery in an informal way. I advised him of his statutory rights and told him to some extent what others had said, and I asked him if he wanted to make a statement about it, and he said that he did. I turned him over to Captain Beman, and he questioned him. I talked to Emuil about three minutes, but I don't think I asked him a single question, Captain Larkins or someone else questioned him. The reason for having Benjamin take his clothes off was because I was informed that he had gotten an injury running through the woods or that he had been hit by a stray shot. We didn't know whether or not this was true, and asked him to take his clothes off in order to examine him and find out. During the time I was present neither I nor any other officer told them the would be electrocuted, burned, or hung if they wouldn't tell the truth, or that if they did tell the truth we would make it lighter on them.

Re-cross-examination by E. B. BAKER, Esq.:

Except Emuil I do not know what promises or statements were made by other officers because I was not there all the time.

Re-cross examination by WILKES T. THRASHER, Esq.:

I do not know whether Benjamin's mother and father were in the next room or not, they were there when we brought them in.

He did not send after Benjamin and did not see him when he first came in, and I don't know how he came. There were two rooms and a number of people came in and out of the other room; his mother and father could have been there, I would not have known them.

58 The witness, CAPT. LARKINS, having first been duly sworn, testified as follows:

Ruling re admissibility of evidence

By COURT. Gentlemen, I think I have heard enough of this; it is taking up a lot of time. I think I have a fair picture of the situation.

Mr. FRAZIER. Our only reason for putting on these witnesses——

By COURT. The Court thinks there has been enough evidence introduced, and I feel this way about it: of course, it is the duty of officers to protect the rights of defendants, and it is also their duty to protect the rights of society, to do the best they can in trying to balance the rights of both society and the defendants. I don't see anything in this case that I could particularly disapprove except the fact these boys were put in this detention room without any seats, or without any beds, and left there for some time, but I cannot see that within itself would effect their free will, or any statements they might have made. It is held that the mere questioning of a person charged with crime does not render his statements incompetent, and that has been held to be true, even though the questioning might be somewhere rough, or that the defendant might be precluded from seeing counsel, and that is true even though their families might be kept away; I do not see that would effect the character of their statements. In this case, from the way I see the proof, there was no questioning that would show the will of these defendants was entirely overreached. It is true that they are boys, live in the country, have not been far away from home, but it is also true that they are not entirely ignorant of the affairs of life, they have lived close to a main highway, lots of people travel, lots of people stopping along there; they
59 have been in Chattanooga, and they are not so ignorant as some people might think. I think these boys had sense enough to know their rights, and I think the proof shows they were advised of their rights.

Mr. TOWNSEND. What would Your Honor think was the reaction of these midnight sessions?

By COURT. I don't think there was any physical discomfort, it only lasted two days. I don't think that there would effect their free will. There are several elements to be considered, one

is the personal element of the officer making the investigation; they are men engaged in the enforcement of the law, and have to deal with this character of crime, their line of duty does not demand that they high-pressure anybody. I appreciate the fact they would be somewhat aggitated by the killing of a fellow officer, but I don't think from the weight of this testimony that the agents overreached themselves, or imposed upon these defendants. I have read the case handed to me, I have read it before, and the opinion by Justice Black in a recent Supreme Court advanced sheet I had, but I think that case is quite different from this case. In that case there was considerable proof of high-pressure methods upon some colored men, but in this case I cannot see there has been any high-pressure brought on these defendants, which would override their will. I do not think they were promised immunity or reward. I cannot see any of that in this case. This is a question as to the admissibility of evidence.

Mr. Townsend. I want to submit this, your Honor, this is a question of law for the Court to decide.

By Court. That is right.

60 Mr. Townsend. The, otherwise, it is question of fact for the jury.

By Court. I cannot see this is a question of fact for the jury, but is a question for the Court to determine as to the admissibility of the evidence. Whether or not it is admissible is for the Court to say, and the Court is of opinion that it is admissible.

Mr. Baker. We except to the Court's ruling, for all of the defendants.

By Court. It is my judgment that any statements made by any of these defendants, under the conditions as submitted to the Court, are admissible in evidence. You can save your objections as you go along, you may note your general exceptions now.

Mr. Baker. All of the defendants take their exceptions now.

By Court. Let the jury come in.

(Thereupon, at this point the jury returned to open Court.)

61 In United States Circuit Court of Appeals, Sixth Circuit

No. 8900

BENJAMIN McNABB ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Tennessee

Opinion

Filed December 6, 1941

Before ALLEN, HAMILTON, and MARTIN, Circuit Judges

MARTIN, Circuit Judge: Another tragic chapter has been written in the bloody book of an age-old history of resistance by lawless mountain clans to enforcement of the Internal Revenue Laws of the United States. From the family burying ground of the Clan McNabb, a death dealing shot was fired in the dark upon a Federal Alcohol Tax Unit Investigator, while in the performance of his official duty.

Five McNabbs were indicted on the charge of murdering the officer. Freeman and Raymond McNabb, twin brothers, and their cousin, Benjamin McNabb, were convicted of murder in the second degree, were sentenced to forty-five years' penal servitude, and have appealed. The other two McNabbs, Emuil and Barney, were acquitted on directed verdicts with the approval of the Government attorney.

The killing occurred in Marion County, in a mountainous section of eastern Tennessee known as the McNabb Settlement, long inhabited by that family.

The murdered Federal Officer, Samuel Leeper, had accompanied, in an automobile, three fellow officers in the Internal Revenue Service on a raid, guided by two informers by whom arrangements had been made to purchase some seventy-five gallons
62 of untaxpaid whiskey from members of the McNabb family.

The four Revenue Officers met the two informers at an appointed place on July 31, 1940, around 8:45 or nine o'clock P. M., drove with them in a separate automobile, and parked their car about one-half mile from the spot where the whiskey was to be delivered. Thence, they rode toward the McNabb Settlement in an automobile driven by one of the informers, who was accom-

panied by the other. While driving up the "McNabb Road," they saw some persons ahead, whereupon informer Davidson cut off the lights of the automobile and the officers alighted from the car. The two informers then proceeded to drive down the road to a point where they found Benjamin, Freeman, Raymond, Emuil, and Barney McNabb awaiting them.

The arrangements made between the informers and the McNabbs had been to have the whiskey delivered at a barn; but, when the informers arrived, they were told that the whiskey was cached near a gate to the family cemetery. All five of the defendants were identified as present to participate in the delivery of the illicit liquor.

The car was driven into a hog lot and turned around near the edge of the cemetery. Three of the McNabbs and one of the informers were engaged in carrying the whiskey in five-gallon cans to the car when, by prearranged signal to the officers, informer Davidson flashed a flashlight on the front wheel of the automobile. The four Revenue Officers started forthwith on a run toward the car. One of the officers exclaimed, "All right, boys, Federal Officers!"

The three convicted McNabbs ran into the cemetery; the two acquitted McNabbs also made their escape. As the Federal Officers closed in, the informers drove the automobile past them and departed as previously planned.

The officers ran to the cemetery gate. Having failed to apprehend any of the McNabbs, three of the officers, including Leeper, proceeded to empty the five-gallon whiskey cans found there. One of the officers left to bring their automobile. While the remaining officers were emptying the whiskey, a rock was thrown toward them.

Officers Renick and Abrams stood waiting for the cans to drain. Officer Leeper climbed over the cemetery fence and, with lighted flashlight in hand, was pouring out the contents of two cans of whiskey found within the cemetery when he was fatally shot by the discharge from a shotgun. Apparently, the gun was fired from behind an oak tree near the center of the cemetery. Though
63 peppered with gun shot, Leeper drew his pistol and commenced firing.

One of the officers, Renick, ran to the aid of his stricken comrade. "Where did he go, Sam?" he asked. "Behind that big rock!" Leeper replied. Renick fired two shots.

"About three minutes after the first shotgun was fired," Renick narrated at the trial, "there was a second shotgun shot and I was struck by four or five pellets or shots in different places of my face and body, and the shots apparently came from a different

direction. At the time of the second shot, I realized that my flashlight would make a good target and I turned it off and walked back to where Abrams was and I said, 'maybe they will get you too.'"

Leeper passed away a few minutes after Renick was shot. Officer Jones, who had gone for the automobile, returned to the scene and, when informed of the situation, went to the nearby house of Jim McNabb and brought back with him a boy, Lawrence McNabb, who assisted the officers in placing the decedent's body in the automobile. The only other McNabb who appeared was a woman who said she was the wife of Barney McNabb. Pursuant to the request of Officer Jones, who rejoined them some twenty minutes after the shooting, the two informers summoned an ambulance, to which the dead body was transferred near the Marion County line and carried into Chattanooga.

Freeman, Raymond, and Emuil McNabb were arrested on the night of the murder, brought into Chattanooga and placed in the bull pen in the office of the United States Marshall around two o'clock in the morning. Barney McNabb was arrested the following morning, and Benjamin McNabb, accompanied by his mother and father, surrendered himself to arrest on August 2nd, saying that his mother had been told by the officers that they wanted him to come in.

After their incarceration, the five defendants, some times together, at other times separately or in groups, were repeatedly questioned concerning the crime by numerous Alcohol Tax Unit Investigators. The nature of these interrogations presents the usual conflict in testimony between the accused on the one hand and the officers on the other.

The version of the defendants was that, deprived of food, they were confined in the bull pen of the United States Marshal's office, without beds or chairs, from two o'clock in the morning of August first until five o'clock that afternoon, when they
64 were transferred to the county jail where they were served cheese sandwiches. After a short surcease, they were returned to the Federal Building and interrogated until midnight before being taken back to the county jail.

Before noon next morning, they were again conducted to the Federal Building and examined at intervals until two o'clock of the following morning. They say that, within this period, they were aroused from bed in the county jail around ten P. M., retaken to the Federal Building and there, surrounded by Federal Revenue Officers, were abused, cursed, threatened, accused of lying, and promised lighter punishment should they tell the truth. An acquitted defendant, Barney McNabb, was struck on the head with a book, according to his testimony—not given, however, before the

jury. None of their friends, relatives, or counsel were present while the McNabbs were being questioned.

The Federal Officers sharply contradicted the testimony of the accused, asserted that the defendants were furnished sufficient food and drink; and denied that any promises, inducements, or threats were made, or that any intimidation, coercion, physical violence, or undue pressure was exercised. The officers asseverated that the self-incriminating statements of the defendants were voluntary.

The District Supervisor of the Alcohol Tax Unit, Bureau of Internal Revenue, who was in charge of the investigation, testified: "I told each of them (the five defendants) before they were questioned that we were Government Officers, what we were investigating, and advised them they did not have to make a statement, that they need not fear force and that any statement made by them would be used against them and that they need not answer any questions asked unless they desired to do so, and I asked each of them if he understood that. I talked to each of them individually and each of them said he so understood. I told them that if they did answer the questions to tell the truth, but that they had a right to refuse to answer if they wished. * * * I have never threatened or abused any defendant in my life and I have been in the law enforcement work fifteen years. * * * When I knew the truth I told the defendants what I knew. I never called them damn liars, but I did say that were lying to me."

(1) Before receiving in evidence any purported incriminating statements of the defendants which the Government sought to prove had been made to the officers, the trial judge ordered the jury to retire from the courtroom, and during the exclusion of the jury he heard at length and in detail testimony of officers, defendants and other witnesses. This was in conformity with established proper practice. Cohen v. United States, 291 Fed. 368 (C. C. A. 7); Mangum v. United States, 289 Fed. 213 (C. C. A. 9); Hale v. United States, 25 Fed. (2d) 430 (C. C. A. 8); Wilson v. United States, 162 U. S. 613, 624.

Upon the conclusion of this hearing, the judge, for announced reasons, ruled that any statements made by the defendants "under the conditions as submitted to the court" were admissible in evidence. The trial to the jury proceeded and a number of Revenue Officers testified to admissions made by the defendants.

None of the defendants testified before the jury.

Assigning error, the appellants charge that the admissions or confessions were not free and voluntary, but were obtained by "duress, coercion, and hope of reward to the extent that the will and mind of the appellants were subjugated."

The assignment must be overruled. The record reveals no situation remotely comparable to the plight of the defendants depicted in Chambers v. Florida, 309 U. S. 227, or in Brown v. Mississippi, 297 U. S. 278. No circumstances calculated to inspire terror or coerce free will have been shown in the instant case.

A free, voluntary confession, made without compulsion or inducement of any sort, is admissible in evidence. Where the evidence conflicts as to whether the confession is voluntary, if the court decides that the confession is admissible, the jury should be instructed to reject the confession if upon the whole evidence they find that it was not voluntary. Wilson v. United States, 162 U. S. 612, 624.

In Sparf v. United States, 156 U. S. 51, 55, it was said that "confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises."

When both affirmation and denial of a voluntary confession are in evidence, the issue of truth must be decided by the jury. In instructing the jury, the district judge carefully guarded the rights of the defendants: "Before you can consider the confessions of the defendants, or any of them, you must find they were voluntarily made. You take into consideration the facts and circumstances before you on this subject, the way and manner by which said confessions and admissions were obtained, and if they were
66 warned that what they said might be used against them.

It is sufficient if a confession is voluntarily made after having been warned or advised, and made without the aid of counsel, and made to officers while in custody; but if the confessions or admissions were not of a free and voluntary nature, then you will entirely disregard such confessions or admissions. In passing upon these questions you will consider the age and experience, the station in life, and the physical condition of the defendants making such statements, whether they had friends or relatives or counsel present, whether the questioning was carried on in a reasonable manner or not, whether they were threatened, abused, or forced to do acts against their will. If you conclude from the proof that the confessions or admissions were not the free and voluntary acts of the defendant, then you will disregard them and not consider them at all in your deliberations. It is for you to determine what credit you will give to the confessions in an effort to arrive at the truth in the case."

(2) Error is assigned to the action of the district court in admitting the testimony of two Government witnesses, Jones and Larkin, whose names were omitted from the list of witnesses furnished defendants. The predicate of the assignment is noncompliance with the mandate of Section 1033 of the Revised Statutes.

Title 18, Section 562, U. S. C. A., which provides: "When any person is indicted of treason, a copy of the indictment, and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial."

This statute is mandatory. Logan v. United States, 144 U. S. 263, 304; Wilson v. United States, 104 F. (2d) 81 (C. C. A. 5); Brown v. United States, 63 F. (2d) 136 (D. C. App.).

In the Logan case, the Supreme Court said: (op. 304) "The words of the existing statute are too plain to be misunderstood. * * * The list of witnesses required to be delivered to the defendant is not a list of the witnesses on whose testimony the indictment has been found, or whose names are endorsed on the indictment; but it is a list of the witnesses to be produced on the trial for proving the indictment.' The provision is not directory only, but mandatory to the government; and its purpose is
67 to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defense. Being enacted for his benefit, he may doubtless waive it, if he pleases; but he has a right to insist upon it, and if he seasonably does so, the trial cannot lawfully proceed until the requirement has been complied with."

It was observed, further (307), that "the statute does not make a defendant's right to a list of the witnesses to be called against him depend upon the degree of the crime of which upon trial he is ultimately convicted, but upon the degree of the crime for which he is indicted."

It is important to observe that the Supreme Court found it unnecessary "to express a definite opinion upon the question whether the omission to deliver the list of witnesses to the defendants would of itself require a reversal of their conviction and sentence for less than a capital offense, inasmuch as they are entitled to a new trial upon another ground." Appellants have presented no decision where a judgment of conviction has been reversed upon the basis of nonobservance by the Government of the statute which they invoke. The dicta in the Logan case does not preclude the view that the failure of the trial court to require compliance with the mandatory statute was harmless error.

In our judgment, the error was, in fact, harmless. The testimony of the two witnesses whose names did not appear on the list was merely cumulative on material matters. Both had testified before the Commissioner at the preliminary hearing. Both had

been sworn and had answered several questions before defendants' attorney challenged their right to testify. No element of unfair surprise has been shown and no prejudical invasion of the rights of the defendants appear. The omission of the names of the two witnesses from a long list was obviously an unintentional, non-prejudical error. Counsel for the defendants did not even suggest the entry of a mistrial order or request a continuance when their objection was overruled. Both in the trial court and here the attorneys for the defense have stood frankly on the technical applicability of the statute.

Section 269 of the Judical Code, as amended, provides: "All United States Courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall
68 give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." U. S. C. A., Title 18, Sec. 391; R. S. Sec. 726; Mar. 3, 1911, c. 231, Sec. 269, 36 Stat. 1163; Feb. 26, 1919, c. 48, 40 Stat. 1181.

In a criminal case, this court, applying the statute quoted, held that conviction will be reversed only where it appears that there has been committed a plain and vital error indicating a miscarriage of justice in the result. Westfall v. United States, 2 F. (2d) 973 (C. C. A. 6). See also, Stetson v. United States, 257 Fed. 689, 693 (C. C. A. 6); Dierkes v. United States, 274 Fed. 275 (C. C. A. 6). In civil cases, our court has likewise held that if the record fairly indicates that the error was not prejudicial, a reversal is not necessary. Mitchell v. Pittsburg, etc., R. Co., 83 F. (2d) 704, 705. In Morton Buhler Timber Co. v. United States, 91 F. (2d) 884, 899, we said: "An error must be deemed harmless if upon examination of the entire record substantial prejudice to the defendant does not appear." The statute in terms applies to both criminal and civil cases.

Other United States Circuit Courts of Appeals have applied the harmless error statute (Section 269 of the Judical Code) in upholding convictions in criminal cases, where on the whole record no prejudical error appeared. Bruno v. United States, 67 F. (2d) 416, 421 (C. C. A. 9; Johnson v. United States, 59 F. (2d) 43, 46 (C. C. A. 9); Lewis v. United States, 38 F. (2d) 406, 410 (C. C. A. 9); Haywood v. United States, 268 Fed. 795, 798 (C. C. A. 7); Claibourne v. United States, 77 F. (2d) 682, 690 (C. C. A. 8); Green v. United States, 93 F. (2d) 537, 539 (C. C. A. 10).

Without reference to the statute, it has been held in still other circuits that a judgment of conviction in a criminal case should not be reversed for harmless error. Martin v. United States, 100 F. (2d) 490, 497 (C. C. A. 10); Finn v. United States, 251 Fed. 476, 483 (C. C. A. 2).

On the whole record, there appears no resultant prejudice to defendants from the omission of the names of two witnesses from the long list furnished the defendants by the Government in conformity with Section 1033 of the Revised Statutes (U. S. C. A., Title 18, Sec. 562.)

(3) Appellants assert that the district court erred in refusing to charge, at their request, that: "if the defendant or defendants
69 though that the deceased Samuel Leeper was a hi-jacker or robber, and that he was present in the McNabb Cemetery for the purpose of stealing or taking by force of arms the whiskey involved, then the owner or owners of such whiskey would have had the right to use such force as was necessary to prevent the taking of said whiskey, and if they used no more force than was necessary then they would not be guilty; but if more force than was necessary was used, then this would reduce the degree of homicide to manslaughter."

This requested instruction was properly refused. The defendants were not defending their "castle." The deadly shot was fired from ambush. In the circumstances, there could be drawn no reasonable inference that the killing was in the sudden heat of passion. Cooling time had intervened. The crime committed does not reduce to voluntary manslaughter.

Moreover, as Joel Prentiss Bishop has truly declared in his authorities Treatise on Criminal Law (Ninth Edition): "Life being superior to property, no one has the right to kill another in defense of the latter; yet by less extreme means, one may defend his own (Sec. 706). * * * A man may defend his property by any force necessary under the circumstances, such as assault and battery, short of taking the agressor's life. But rather than slay him, he must yield and find his protection in the courts." (Sec. 875.)

(4) Appellants complain further that, at their request, the district court should have charged the jury that the defendants could not be convicted unless they knew or had reasonable grounds to believe that the murdered man was a government officer. They charge error also in the refusal of the court to direct a verdict of acquittal for the reason that the appellants "did not have notice or knowledge that the deceased was an officer connected with the Internal Revenue Department of the United States of America at the time the fatal shot was fired."

Refutation of this specious argument is found in the plain language of the statute: "Whoever shall kill, as defined in Sections 452 and 453[1] of this title any United States Marshal * * * any officer, employee, agent, or other person in the service of the customs or of the Internal Revenue * * * while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under Section 454[2] of this title." U. S. C. A., Title 18, Sec. 253, inclusive of amendment of June 13, 1940, c. 359, 54 Stat. 391.

To be amenable to punishment under this section of the Criminal Code of the United States, the killer need not know that he is killing an officer, agent or employee of the United States. The ingredient of the crime condemned is the unlawful killing of a human being in some manner defined in Sections 452 and 453.

Jurisdiction in the Federal Courts under Section 253 stems from the actuality that the person killed is a designated Federal Officer, engaged in the performance of his official duties. In the language of the statute quoted in excerpt, no exemption is expressly made of a killer who does not know that he is killing a Federal Officer of a class covered by the statute. Exemption may not be implied. The words and the intent of the statute are clear beyond the necessity for any canonical construction. The statute says, "whoever shall kill," not "whoever shall kill with knowledge that he is killing" a Federal Officer of an enumerated class, shall be punished.

Sinhay v. United States, 95 F. (2d) 890 (C. C. A. 10), cited by appellants, in no aspect gainsays our interpretation of the statute.

(5) Appellants insist that the evidence was insufficient, as a matter of law, to sustain a conviction of murder in the second degree and that it was the duty of the district court

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[1] "Sec. 452. (Criminal Code, section 273.) Murder; first degree; second degree. Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree." (R. S. Sec. 5339; Mar. 4, 1909, c. 321, Sec. 273, 35 Stat. 1143.) U. S. C. A., Title 18, Sec. 452.

"Sec. 453. (Criminal Code, section 274.) Manslaughter; voluntary; involuntary. Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary.—Upon a sudden quarrel or heat of passion.

Involuntary.—In the commission of any unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (R. S. Sec. 5341; Mar. 4, 1909, c. 321, 1143). U. S. C. A., Title 18, Sec. 454.

[2] "Sec. 454. (Criminal Code, section 275.) Punishment; murder; manslaughter. Every person guilty of murder in the first degree shall suffer death. Every person guilty of murder in the second degree shall be imprisoned not less than ten years and may be imprisoned for life. Every person guilty of voluntary manslaughter shall be imprisoned not more than ten years. Every person guilty of involuntary manslaughter shall be imprisoned not more than three years, or fined not exceeding $1,000, or both." (R. S. Secs. 5339, 5343; Mar. 4, 1909, c. 321, Sec. 275, 35 Stat. 1143). U. S. C. A., Title 18, Sec. 454.

to direct the jury to return a verdict of not guilty of murder in the second degree.

In considering this insistence, a United States Circuit Court of Appeals must conform to the function prescribed by the Supreme Court that the examination of the record in a criminal case is "not for the purpose of weighing conflicting testimony but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict." Abrams v. United States, 250 U. S. 616, 619.

Or, as stated in Burton v. United States, 202 U. S. 344, 373: "It was for the jury to pass upon the facts; and as there was sufficient evidence to go to the jury, this court will not weigh the facts, and determine the guilt or innocence of the accused by the mere preponderance of evidence, but will limit its decision to questions of law."

In Ryan v. United States, 99 F. (2d) 864 (C. C. A. 8), it was held that on appeal from a judgment of conviction, the reviewing court, in passing on the question of sufficiency of evidence, is required to accept that view most favorable to the government, inasmuch as the jury has found the appellant guilty. Cf. Knoble v. United States, 9 F. (2d) 567 (C. C. A. 6).

Again, in Pierce v. United States, 252 U. S. 239, 252, the functions of judge and jury are plainly demarked: "There being substantial evidence in support of the charges, the court would have erred if it had peremptorily directed an acquittal upon any of the counts. The question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide."

There is direct evidence in the record that when the two informers arrived near the spot where the Revenue Officer was subsequently killed, the three appellants were there, with the two McNabbs who were acquitted. The informers were told that the whiskey would not be loaded at the barn as pre-arranged, and were directed to drive down a little road to the cemetery. Three of the McNabbs, Raymond, Benjamin, and Emuil, placed themselves on the side of the informers' automobile and rode down to the cemetery gate, where the car was turned around. Raymond and Benjamin McNabb were assisting informer Davidson and Barney McNabb in carrying the whiskey from the cemetery to a location near the cemetery gate, when someone ran across the hill and shouted, "Don't load! Something funny!"

Informer Davidson then flashed his flashlight as a signal
72 to the Revenue Officers. As the officers ran in, the two informers jumped into the automobile and drove away, stopping when over the hill a quarter or half mile away to meet Officer Jones, as planned.

A description of the action at the time of the killing has been given heretofore and will not be repeated.

Only the admissions and confessions of the defendants, as related by several Alcohol Tax Unit investigators on the witness stand before the jury remain to be summarized, to complete a survey of the substantial evidence upon which the jury convicted appellants.

The statements of Benjamin McNabb will be first considered. According to the testimony of the investigators who questioned him, Benjamin McNabb stated that when he left his home he was unarmed, that he crossed the Tennessee River and, in the late afternoon, before dark, arrived at the McNabb Settlement where he met three persons and was told that his liquor had been sold to two people. He objected on the ground that the persons named were "hi-jackers" and might "hi-jack" the liquor, but later withdrew his objection and agreed to the sale. He was with the party which met the informers' automobile, and his statement was in substantial conformity with the testimony of Officers Renick and Abrams and Informer Davidson as to the driving of the informers' automobile to the cemetery gate and the transportation of the liquor to that conveyance. While he was assisting in carrying liquor to the car, someone exclaimed, "Look! There comes the law!" He ran, and lost his black hat in his flight. The hat, identified by him, was found on the ground in the hog lot.

His statements varied as to whether he ran through the graveyard or away from it, but he admitted throwing a rock toward the officers who were pouring the liquor out of the cans. He said that he met Freeman and Raymond McNabb at a gate at the northeast corner of the cemetery. The gate near which the liquor had been cached was to the south. According to his statement, when he asked them what he should do, Freeman handed him a shotgun and a flashlight, and Raymond said, "Pour it on them." Raymond McNabb consistently denied this, and insisted that he told Benjamin not to shoot. Freeman denied meeting Benjamin and Raymond at the cemetery corner and handing the gun to the former.

Benjamin McNabb admitted firing the fatal shot, saying that he fired from a position in the rear of the graveyard fence. He denied firing the second shot and contended that he merely heard it as he ran down hill to Jim McNabb's house. At another time, however, he said that he did not hear the second shot until he arrived at the house. He stated that after he had fired he gave the gun to Raymond and that Freeman gave him another shell to load into the shotgun. A shot-

gun shell was found about twenty-five yards north of the graveyard.

Benjamin McNabb, according to the testimony of the Assistant District Supervisor of the Alcohol Tax Unit, marked on a crude pencil-drawn map, introduced in evidence, the course of his various movements.

From the review which has been made, there was certainly ample evidence upon which the jury could properly convict the killer, Benjamin McNabb, of murder in the second degree.

The statements of Freeman and Raymond McNabb will be now considered. It should be commented that the District Judge was careful in his effort to avoid consideration by the jury of an admission or confession of one defendant as evidence against another. In the hearing of the jury, the witnesses were required to substitute "persons" for the names of individuals referred to by any suspect when making his voluntary statement, describing his own actions.

Furthermore, the jury were charged that "any confession or admission introduced in evidence is competent evidence only against the person making it, unless some other defendant was present and agreed that the statement was true. If any other defendant was present at the time and denied the statement made in the confession, then it cannot be considered as evidence against the defendant so denying it."

Inasmuch as Benjamin McNabb was the proven killer, the guilt or innocence of Freeman McNabb and Raymond McNabb of second degree murder turns upon whether they were aiders and abettors in the crime.

Section 332 of the United States Criminal Code provides: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." U. S. C. A., Title 18, Sec. 550.

According to the testimony of the investigators, Freeman McNabb admitted that he arranged for the sale and delivery of the illicit whiskey, that when he went up the road on the evening of the tragedy he carried a shotgun because he thought someone might try to get his whiskey . . . and he meant
74 to shoot anybody who tried to take his whiskey." He also admitted that he carried the flashlight which was subsequently found in the cemetery between the spot where the decedent Leepey was shot and the white oak tree, from near which Raymond said the shot was fired. Benjamin McNabb asserted that he had returned the flashlight to Freeman and that it was not in the former's possession while he was in the graveyard.

Freeman McNabb admitted that he was the person who shouted, "Here comes the law!" But he immediately changed his admission as to what he exclaimed to, "Look out! It is three men!" His statement substantiated the testimony of the Federal Officers as to occurrences prior to the shooting. He stated that he stayed behind the automobile, so that if "hi-jackers" did get after his whiskey he would keep them from getting away with it.

From the circumstances which have been related, from the fact that his flashlight was found in the cemetery, and from the fact that he carried a gun with admittedly malevolent intent, the jury could readily infer that Freeman McNabb aided and abetted the killing of Officer Leeper.

From the testimony of the investigaters, it appears that Raymond McNabb admitted that he heard his twin brother, Freeman, shout, "Look out! Here comes the law!" and that he ran through the graveyard to Jim McNabb's house but returned later to the cemetery fence corner at the rear gate, where he met his brother and Benjamin McNabb, though he denied that he told the latter to "pour it on them." At another time, he said that he ran through the upper end of the graveyard, around to the rear cemetery gate, where he met the two. He did not at any time deny meeting his brother and Benjamin at the little cemetery gate before the shooting. He admitted that he was behind the graveyard and saw Benjamin McNabb fire the fatal shot. His first description was that Benjamin went to the center of the cemetery and from near a big tree fired two shots as rapidly as he could fire, re-load and fire again. He immediately changed this statement, however, and said that Benjamin fired only one shot from near the tree and that when the second shot was fired, he (Raymond) was running down hill.

The court carefully charged the jury that a person would not be guilty of murder simply because he was present when the murder was committed and where there was nothing to indicate that he had participated therein directly, or was "aiding or abetting, counseling, commanding, or procuring the murder."

Upon his own description of his movements, the circumstantial evidence and the whole proof, Raymond McNabb who, after running away from the officers, met and stood in ambush nearby the killer when the fatal shot was fired, could, with reasonable justification, be found guilty of aiding and abetting second degree murder. The verdict of the jury should be upheld.

The judgment and sentence of the District Court, as to each of the three appellants, is affirmed.

76 Supreme Court of the United States

Order granting motion for leave to proceed in forma pauperis

June 8, 1942

On consideration of the motion for leave to proceed further herein in forma pauperis,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

77 Supreme Court of the United States

Order allowing certiorari

Filed June 8, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1942

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 25

BENJAMIN McNABB, FREEMAN McNABB, AND RAYMOND McNABB,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MEMORANDUM FOR PETITIONER.

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E. B. BAKER,
J. M. C. TOWNSEND,
WILKES T. THRASHER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MEMORANDUM FOR PETITIONER.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 40) is reported at 123 F. (2d) 848.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 6, 1941. Rehearing was denied on January 8, 1942. The petition for a writ of certiorari was filed

February 13, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 43, 1925. Certiorari granted 62 Supreme Court 1305.

Questions Presented.

Whether the trial court should have excluded from evidence petitioners' extra judicial admissions on the ground that they were not voluntarily made.

Statement.

Petitioners were convicted in the United States District Court for the Eastern District of Tennessee of Second degree murder for the killing of Samuel Leeper while he was engaged in the performance of his official duties as Investigator for the Alcohol Tax Unit of the Bureau of Internal Revenue. (18 U. S. C. A., 253, 452.)

The petitioners were sent to prison for 45 years. The Sixth Circuit Court of Appeals affirmed the judgment (R. 40).

The convictions were brought about by the use of confessions and admissions by the petitioners.

Evidence as to How the Confessions and Admissions Were Obtained.

On the night of July 31st, 1940, agents of the Alcohol Tax Unit went to what is known as the McNabb settlement in Marion County, Tennessee, for the purpose of apprehending members of the McNabb family who were supposedly in possession of untax paid whiskey. On arrival they discovered several cans of whiskey. They started to destroy this whiskey, and while emptying the cans someone fired on them from a shot gun. The agent, Samuel Leeper, died shortly thereafter.

Some three or four hours later Alcohol Tax Agents went to the home of petitioners Freeman McNabb and Raymond McNabb and arrested them. They did not have a complaint or warrant of any kind. (The complaint was not taken out until the afternoon of August 2nd, R. 34.)

Emuel McNabb was also arrested at that time, but was acquitted.

Immediately after their arrest the petitioners, Raymond and Freeman, were brought to Chattanooga and taken to the Federal Building, arriving at approximately two o'clock A. M. They were confined in the "bull pen", adjoining the Marshal's office. This is a small barred room. It does not have beds, benches or chairs. Petitioners were kept in this room from about 2 A. M. until approximately 5 P. M. the next afternoon, or approximately fifteen hours. During that time they had to sit or lie on the bare floor (R. 32-29-12-13). They were then taken to the Hamilton County jail and there confined. After remaining in the Hamilton County jail for a period of about two hours, the agent in charge (Taylor) sent to the jail and had the prisoners brought back to the Federal building where he and other agents questioned them until about 1 A. M. when the prisoners were returned to the Hamilton County jail. The reason he sent for the prisoners at night was:

"I questioned Barney that morning at the cemetery and again that night about 9 o'clock in the Post Office Building. I sent to the jail for them and didn't know whether they were asleep or not, but it is not unusual to get defendants out of bed when you are trying to solve a crime as quickly as you can and if we can get them at night we do so. We are interested in getting the truth about it while it can be gotten. I probably could have gotten the truth later but it seems to me a man knows more about what he did immediately afterward and will be more apt to tell the truth

about it than at any other time. None of the defendants had an opportunity to talk with their families or to a lawyer. The reason we questioned the defendants at night was because we wanted to know as much about the case as possible before questioning them and it was some time before we got to them" (R. 36-7).

The uncontradicted facts in this case show:

1. The officers knew the truth, and constantly reminded the petitioners they knew the truth, and that they, the petitioners, were lying (R. 36-9-10-15-17).

2. Raymond and Freeman McNabb were questioned until 1 o'clock on the night of August 1st (R. 36).

3. Raymond and Freeman McNabb were questioned off and on by various officers all day on August 2nd (R. 36).

4. Benjamin McNabb was questioned on August 2nd, and at one time during the questioning was compelled to remove all of his clothes and turn around naked in the presence of several officers (R. 36).

5. All three of the petitioners, together with Barney and Emuel McNabb who were acquitted, were taken out of bed by Federal officers between 9 and 10 o'clock on the night of August 2nd, and questioned until at least 2 A. M. on the morning of August 3rd, when "satisfactory statements" were obtained by the officers, bearing in mind that the officers knew what was true and what was not true beforehand (R. 23-36-20-17).

6. The officers were very tired during this questioning and wanted to go to sleep (R. 20).

7. At least six officers participated in the questioning and the officers came in and out of the room at all times. (At least ten officers testified in this case) (R. 17).

8. The petitioners at no time had relatives, friends, counsellors, or advisers present, and when they tried to get in relatives, friends, counsellors, and advisers were denied admittance (Government Brief, page 24).

9. The petitioners were ignorant mountain boys, none of them having been further than the 4th grade in school, and none of them having been more than 25 miles away from home before they were arrested (Government Brief, page 23).

10. The officers were investigating the death of a fellow officer and from the mere fact that at least ten officers were aiding in the investigation of this matter would indicate their agitation and concern over the matter.

The government admits, in brief, pages 22 to 26, that points 4-8-9-10-11 are true.

11. Freeman and Raymond were confined in a bare room for fifteen hours (Government Brief, page 23).

Argument.

This case is comparable with *Anderson et al.* v. *United States*, Number 10, present term.

Practicaliy all of the elements of compulsion present in *Ward* v. *United States*, 62 Supreme Court 143, are present. See also:

Bram v. *United States*, 168 U. S. 532;
Wan v. *United States*, 266 U. S. 1;
Chambers v. *Florida*, 309 U. S. 629.

Summary.

For manifest violations of the 5th Amendment, Counsel feel this case should be reversed and petitioner awarded a new trial.

Respectfully submitted,

W. H. Norvell,
Attorney for Petitioners.

E. B. Baker,
J. M. C. Townsend,
Wilkes T. Thrasher,
Of Counsel.

FILE COPY

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In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 35) [1] is reported at 123 F. (2d) 848.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 6, 1941 (R. 34). Rehearing

[1] The record filed by petitioner consists of (1) a copy of the indictment, sentences, appeal papers, opinion, etc., and (2) a transcript of the evidence bound with a brown cover. The former is referred to herein by the designation "R.," the latter by "T.".

was denied on January 8, 1942 (R. 41; Pet. 2). The petition for a writ of certiorari was filed February 13, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Pet. 3). See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether reversible error resulted from the failure to include the names of two witnesses in the list of witnesses furnished petitioners before trial.

2. Whether the trial court should have excluded from evidence petitioners' extra-judicial admissions on the ground that they were not voluntarily made.

3. Whether there was sufficient evidence to sustain petitioners' convictions of second-degree murder.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of Tennessee of second-degree murder (18 U. S. C. 253, 452) for the killing of Samuel Leeper while he was engaged in the performance of his official duties as an investigator of the Alcohol Tax Unit of the Bureau of Internal Revenue (R. 1–3, 9; Pet. 1–2).[2] Each petitioner was sentenced to imprisonment for

[2] The court, with the consent of the Government, directed verdicts of not guilty as to Emuil and Barney McNabb, who were also indicted (T. 183).

a term of forty-five years (R. 10–12). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgments of conviction were affirmed (R. 35).

The evidence as to the crime

The Government's case may be summarized as follows:

On July 31, 1940, plans were made by the Internal Revenue investigators at Chattanooga, Tennessee, to apprehend members of the McNabb family in the act of delivering nontaxpaid whiskey to two informers, Louis Davidson and Loomis Montgomery (T. 24, 27, 29, 41–42, 43, 46). At about 9:00 p. m. that evening Officers Leeper (T. 2–7), Jones, Abrams and Renick, leaving their car in the woods about one-half mile from the spot where the liquor was to be delivered, drove toward the McNabb settlement[3] with the informers, alighted and went into the woods (T. 24–25, 29, 44). The informers drove on, met petitioners and the defendants Emmil and Barney McNabb, and proceeded with them to the nearby McNabb cemetery for the loading of the whiskey, Davidson driving his car up to the cemetery gate (T. 25).

While the whiskey was being carried from the cemetery to the car by Barney McNabb, Davidson, and petitioners Raymond and Benjamin McNabb,

[3] This settlement, according to the opinion of the Circuit Court of Appeals (123 F. (2d) 850), is in a mountainous section of eastern Tennessee, and has long been inhabited by the McNabb family.

the officers approached the cemetery in the dark and someone called out a warning to those loading the whiskey (T. 25, 30, 38). Simultaneously, Davidson flashed a light on the wheel of his car as a signal to the officers and they immediately closed in. Officer Jones then called out in a loud voice, "All right boys, Federal officers." (T. 25–26, 30, 34–35, 38, 41, 44–45, 55.) Davidson, by prearrangement, drove away (T. 25, 35, 45). The McNabbs began running at Jones' outcry and disappeared (T. 30, 35, 38).

The officers found seven five-gallon cans of liquor in front of the cemetery gate and two inside the gate (T. 35, 38). Officer Jones went back for the car and Leeper, Abrams and Renick, with their flashlights on, proceeded to pour the liquor on the ground, Leeper going inside the cemetery to pour out the two cans there (T. 35–36, 38, 45). While thus engaged, the officers heard some low mumbling that came from the direction of a little gate near a corner of the cemetery (T. 31, 36), and then someone threw a good sized rock at them (T. 36, 38). Shortly thereafter Leeper was shot (T. 31, 36, 39, 45). Renick went to his assistance and was shot also (T. 31, 39). Leeper was dead when Jones returned to the cemetery with help (T. 32, 45; see also T. 157). Renick recovered.

After their arrest by Internal Revenue officers petitioners, according to the testimony of the officers, made the following statements in response to questioning by the officers:

On the night of August 2d Benjamin made a detailed oral statement of the shooting, marking a map (T. 161) to show his movements. He stated that while he was helping to carry the liquor to the car, he heard somebody shout that someone was coming, ran from the scene, stopped and threw a rock at the officers (T. 130, 133, 147, 153, 163, 170), and continued to a small gate at the northeast corner of the cemetery where he met Raymond and Freeman. After some conversation, Freeman handed him a shotgun and a flashlight and told him to "go up there and shoot down there." Raymond told him to "Pour it on them." He went up behind a fence just outside the cemetery to a point where a tree on the outside of the fence would not obstruct his vision of the officers and fired a shot at their flashlights. After he fired, Freeman gave him another shell, he reloaded the gun, and gave it to either Raymond or Freeman. He then left and as he went down the hill toward Jim McNabb's place he heard a second shot. Freeman and Raymond joined him later at Jim McNabb's.[4] (T.

[4] Benjamin's story is corroborated by the testimony of Officers Renick and Abrams (*supra* p. 3). Also, gun wadding was found near the place from which Benjamin shot (T. 30, 31, 135, 142); officers secured the shotgun used to kill Leeper (T. 140–141); maps and photographs of the cemetery were introduced in evidence (T. 11–12, 13–14, 19–23); the line of fire was explained (T. 15, 144–145); bloodhounds followed a trail from the corner of the cemetery to the home of one of the McNabb boys (T. 49–52).

118, 130, 134, 137–138, 142–143, 148–149, 153–154, 161, 163.)

Freeman admitted that he made the arrangements for the sale of the liquor (T. 133), and that he carried to the cemetery the flashlight which was found near the place from which Benjamin shot (T. 123, 124, 128, 129, 135–136) and the shotgun that was used to kill Leeper, intending to use the gun to shoot anyone who attempted to take his whiskey (T. 129, 138, 140). He warned the others of the approach of the officers by shouting either "Here comes the law" or "Here comes somebody" (T. 129, 133, 138–139, 141, 156, 166–167, 169), and admitted that he witnessed the shooting (T. 153). He claimed that he told Benjamin not to shoot because "they were officers down there" (T. 153), but admitted, apparently, that he furnished Benjamin with another shell to reload the gun (T. 154).

Raymond admitted hearing Freeman shout, "Here comes the law" (T. 139, 165); that he and Freeman met Benjamin at the northeast corner of the cemetery, that Benjamin was given the gun, and that he was there behind the cemetery when Benjamin fired (T. 118, 138, 139, 156). After stating that Benjamin fired two shots, he changed his story and stated that Benjamin fired only one shot (T. 166). He denied having told Benjamin to "Pour it on them" (T. 153, 166).

The trial court, after hearing evidence in the absence of the jury concerning the circumstances under which the statements were made, held that

the officers could testify as to the substance of the statements. An exception to this ruling was noted. (T. 115–117.) At the conclusion of the Government's case, petitioners moved to exclude from the consideration of the jury "all evidence concerning confessions and admissions allegedly made by any of these defendants, or any one of them, because they were not free and voluntary statements, and such statements were obtained by compulsion and duress * * *". This motion was denied (T. 172), and the same action was taken upon a renewal of the motion when the case closed (T. 182).

The evidence as to the circumstances under which petitioners' statements were made.

The evidence heard by the trial judge in the absence of the jury may be thus summarized:

PETITIONERS' EVIDENCE

Emuil McNabb and petitioners Raymond and Freeman McNabb[5] were arrested by Officer Jones about 1 or 2 a. m. on August 1, 1940, three or four hours after the murder. Each testified that they were brought to the Federal Building in Chattanooga and put in a detention room, where they remained until about 5 o'clock in the afternoon, when they were taken to jail (T. 98, 100, 104). Barney was arrested by a State officer about 5 o'clock in the morning of August 1, and was surrendered to the

[5] The three are brothers, Raymond and Freeman being twins (T. 95, 104).

Federal authorities four or five hours later (T. 102, 103). Benjamin voluntarily came into the Internal Revenue offices at Chattanooga in the morning of August 2 and was arrested (T. 97, 106). Each testified, in addition, as follows:

Freeman McNabb: Freeman testified that he was 25 years old; that he had lived in the community during his entire life, and had gone through the fourth grade at school; that he had never been farther away from home than Jasper, about twenty-one miles; that when he was in the "cage" in the marshal's office the first day (August 1) he and his brothers were not given anything to eat or drink; that he was questioned before being taken to jail; that he remained there an hour and then was brought back and questioned by Mr. Taylor (the District Supervisor of the Alcohol Tax Unit (T. 109)) and another man from about 5 to 11 p. m.; that "they brought me back two or three times, some in the afternoon and some at night." The next day, according to Freeman, he was questioned from about 5 or 7 p. m. until 11 p. m. They then "came to the jail and woke us up and kept us up until 3 or 3:30 in the morning. * * * Emuil wanted to send out and get something to eat and they wouldn't let him. * * * No one ever offered us anything to eat, no one offered us coffee, coca colas or anything". "During this time", Freeman testified, "they threatened to slap me on one occasion and one officer said I was crazy and yellow

and was a big pile of manure in my neighborhood. I reckon he told me that because he said I was lying. He called me a liar a great number of times. I never counted how many, nearly every time I said anything he would say it was a damn lie." No one ever told him that he could have a lawyer, nor that the statements he made might be used against him. They told him that if he would tell the truth they would make it lighter on him and let him make bond. Mr. Taylor seemed to be in charge of his questioning, although there were five or six others around there. None of his friends or family were present. "One time they threatened to knock me out of my chair with their fist, and Mr. Taylor was present and never said anything, but they didn't hurt me." Freeman admitted that he had once pleaded guilty to manufacturing whiskey. (T. 100–101.)

Raymond McNabb: Raymond testified that, like his twin brother Freeman, he had gone to the fourth grade at school and had never been farther away from home than Jasper, but had been to Chattanooga, which was only twelve miles away, a good many times. He had nothing to eat during the time he was in the detention room at the Federal Building. "I didn't make an effort to get anything to eat but my brother did, he tried to get them to get something for all of us to eat. He asked an officer and the officer said we couldn't have anything." He was not questioned while in the de-

tention room, but was taken down to the basement and fingerprinted. After that, about 5 o'clock in the afternoon, he was taken to jail, where he remained until 11 o'clock and where he had a cheese sandwich to eat. Then he was brought back to the Federal Building and kept until between 2 and 3 o'clock, during which time five or six men questioned him. "Mr. Taylor told me he would knock me out of my chair if I didn't tell the truth and that he knew what the truth was and that everything I had told him was a lie. He told me that if I told the truth I could get bond and he would make it light on me. He called me a liar several times, pretty often as a matter of fact and said I was just telling a God-damn lie. He didn't call me any names, however, or hit me with anything but he had a book which he swung around my face pretty often." There was no one with him but the Federal officers, and he was never warned of his constitutional rights. "None of the defendants were with me and I never made any statement and I don't know anything about what my brother was going to swear to." He was in the Federal Court in January, 1938, when he entered a plea of guilty. (T. 104–105.)

Benjamin McNabb: He testified that he was 20 years old, had been to the fourth grade in school and had never been arrested before, had been no farther away from home than Jasper, and had been to Chattanooga. On the morning of August 2 he

came with his father and mother to the Federal Building in Chattanooga because he heard they wanted him. He was arrested and was questioned for about five or six hours. He didn't have a lawyer, friend or relative with him at the time, and the officers never told him that he was entitled to a lawyer, or that anything he said would be used against him. The officers "cursed me and told me I was telling a God-damn lie." They "made me take my clothes off because they wanted to look at me. This scared me pretty much." The officers told him that they knew what the truth was and that he was not telling it and that "if I told the truth they would make it lighter on me but if I didn't they would burn me up in the electric chair." That night the officers brought him back from the jail about 11 o'clock and returned him to the jail about 2 o'clock in the morning. On their way back to the jail the officers stopped in a restaurant and "I had something to eat and played a pinball machine." (T. 106–107.)

Emuil McNabb: He was acquitted and gave no incriminating statement. He testified that he was 22 years old and had gone through the second grade at school; that he had been as far away from home as 200 miles, to Stevenson, Alabama. He testified that he was cursed by the officers, called a liar a good many times, and was advised that if he told the truth it would be lighter on him. He was never told that he had the right to have a lawyer or that any-

thing he said might be used against him. So far as his testimony related to any of the petitioners, he stated that on August 1 he and his brothers Raymond and Freeman were taken from the "pen" in the Federal Building to the Alcohol Tax Unit office, where they were kept three or four hours, until around 9 or 9:30 at night. During this period "we didn't have anything to drink, nor no water to drink and they wouldn't let us send out after any." On the night of August 2 "they woke all five of us up and brought us back down to the Federal Building and kept us until about four in the morning. They didn't ever question us any more after this." He testified that the officers never threatened to strike him, and that he "never heard them threaten to strike any of the others." (T. 98–99.)

Barney McNabb: He was likewise acquitted and gave no incriminating statements. He testified that he was 28 years old, had gone through the third grade in school and had been as far as Jasper. He surrendered himself on the morning of August 1 and was brought to the Federal Building about 9 or 10 o'clock that morning. He also testified that he was told by one of the officers that if he did not tell the truth "he would burn me up", and that if he did he would "make it lighter on me"; that one of the officers cursed him and hit him on the head with a book. "They handcuffed me and kept me handcuffed all the time." He made no specific reference in his testimony to the treatment of petitioners. (T. 102–103.)

The mother of Raymond, Freeman and Emuil testified that on the morning of August 1 she tried to see her sons at the jail and in the basement of the Federal Building where they were being questioned, but that the man who had them ordered her out of the room (T. 95).

Benjamin's mother testified that when she came with him to the Federal Building on the morning of August 2, they at first let her in but then excluded her, and that she did not see him again until he was taken back to the jail (T. 97).

THE TESTIMONY FOR THE GOVERNMENT

A number of officers who either questioned the defendants or were present at the questioning testified. Their testimony may be summarized as follows:

They categorically denied that anyone threatened, cursed, assaulted, or otherwise intimidated the defendants into making the statements, or that any promise of immunity or reward was held out to them, and asserted that their statements were entirely voluntary (T. 68, 69, 70, 80, 88, 89, 93, 94, 109–110, 112, 113, 114). District Supervisor Taylor of the Alcohol Tax Unit, who did most of the questioning, testified (T. 109):

> I told each of them before they were questioned that we were Government Officers, what we were investigating, and advised them they did not have to make a statement, that they need not fear force and that any

> statement made by them would be used against them and that they need not answer any questions asked unless they desired to do so, and I asked each of them if the (sic) understood that. I talked to each of them individually and each of them said they so understood. I told them that if they did answer the question to tell the truth, but that they had a right to refuse to answer if they wished. After they understood what I had told them I then proceeded with the questioning.

At the outset of the questioning each of the petitioners "volunteered to make statements" (T. 69) but the statements they gave when questioned separately either conflicted with those given by the others, were inherently improbable, or failed to "fit with the physical facts" which the officers had learned from investigations at the scene of the crime (T. 69–70, 109–110). As their attention was called to these discrepancies, petitioners would admit that they had lied and then change their stories until finally after the officers "had all five together trying to reconcile their statements" they confessed to facts which were consistent with "the physical facts and circumstances" (T. 69, 71, 109–112).

Benjamin, who had voluntarily given himself up on the morning of August 2, stating that he wanted to make a statement as to his whereabouts on the night of the murder, was thereafter "confronted with the statements made by the other boys" implicating him, and he told the officers "if they are

going to accuse me of that I will tell the whole truth. You may get pencil and paper and write it down" (T. 93–94).[6]

With reference to Benjamin's testimony that he was required to remove his clothes—which "scared me pretty much" (T. 106)—Officer Taylor explained that the officers had been informed that Benjamin "had gotten an injury running through the woods or that he had been hit by a stray shot" and they removed his clothes "for about two minutes" to see if there were any marks on him (T. 112, 113, 114).

The officers also testified that in addition to their regular meals the defendants were given sandwiches, coca-colas and cigarettes during the periods they were being questioned (T. 74, 79, 81, 84, 111).

One of the officers testified that the detention room in the Federal Building to which petitioners Raymond and Freeman were first brought after their arrest contained no beds, chairs, or stools (T. 75), but no complaint as to this was made in the testimony of either of those petitioners.

A friend who accompanied the mother of Emuil, Raymond and Freeman in her attempt to see her sons testified merely that they first went to the jail and Chief Brown told them that they were

[6] There was testimony before the jury that "Benjamin said the reason he told what he did at first was that they made an agreement to tell they were not about the graveyard on that night and they agreed to stick to it" (T. 143).

down at the Federal Building, and that when they went to the Federal Building, the officer told them only "that we could not talk to them until later on. That was all there was to it." (T. 96.)

The composite picture presented by the testimony of the officers as to the duration of the questioning is that Raymond and Freeman were questioned several times on August 1 during the period from about 5 p. m. to some time between 9 and 12 p. m., and that on August 2 from about 9 or 10 o'clock in the morning to about 2 a. m. the following morning all of the defendants were from time to time brought from the jail to the Federal Building, questioned intermittently, sometimes separately, and sometimes together, and then returned to the jail. (T. 66, 67, 68, 69, 70, 76–77, 82–83, 87–88, 93, 109–112.) Freeman was questioned for three and one-half hours on August 2 (T. 112). Apparently, this was the longest period for which anyone was interrogated; the other periods of questioning varied from about 15 or 20 minutes to an hour (T. 67, 112).

The trial court ruled that petitioners' admissions were voluntary and declined to hear further evidence proffered by the Government on this issue. He said that he saw nothing he could particularly disapprove "except the fact these boys were put in this detention room without any seats, or without any beds, and left there for some time," but he could not see that that within itself would affect their free will (T. 115, 117).

He also stated that:

> In this case, from the way I see the proof, there was no questioning that would show the will of these defendants was entirely overreached. It is true that they are boys, live in the country, have not been far away from home, but it is also true that they are not entirely ignorant of the affairs of life, they have lived close to a main highway, lots of people travel, lots of people stopping along there, they have been in Chattanooga, and they are not so ignorant as people might think. I think these boys had sense enough to know their rights, and I think the proof shows they were advised of their rights. (T. 115-116.)

With reference to counsel's inquiry "What would your Honor think was the reaction of these midnight sessions?", the court replied, "I don't think there was any physical discomfort, it only lasted two days, I don't think that there [sic] would affect their free will." (T. 116.)

In reaching his conclusion the trial judge also took into consideration the fact that the officers "would be somewhat agitated by the killing of a fellow officer", but stated that "I don't think from the weight of this testimony that the agents overreached themselves or imposed upon these defendants." (T. 116.)

The trial judge also stated that he did not think that the defendants were promised immunity or reward. (T. 116.)

When the jury was recalled, the defendants did not take the stand to relate their version of the circumstances under which their statements were made, and their counsel contented themselves with cross-examining the officers as to such circumstances. It would seem unnecessary to narrate this testimony, since it is substantially a repetition of that given by the officers prior to the recalling of the jury. (See T. 118–119, 122, 131, 133, 141–144, 147–150, 155–156, 157, 167–170; see also T. 58–60.)

In his charge to the jury the trial court carefully explained the circumstances which it should consider in determining whether the admissions were voluntary and to be considered as evidence (T. 190–191). The court also charged that a confession or admission was competent evidence only against the person making it, unless some other defendant was present and agreed that the statement was true (T. 190).

ARGUMENT

1. Petitioners contend (Pet. 3–4, 9) that the trial court committed reversible error in permitting Government Agents J. D. Jones and E. A. Larkin to testify, because their names did not appear on the list of witnesses furnished to petitioners before trial in accordance with 18 U. S. C. 562.[1]

[1] This section provides that when a person is indicted for a capital offense a copy of the indictment and lists of the jury and of the witnesses to be produced on the trial for proving the indictment shall be delivered to him at least two days before trial.

Petitioners rely upon *Logan* v. *United States*, 144 U. S. 263, where no list of witnesses was furnished the defendants (p. 306). In the course of its opinion, this Court said that this statute is "mandatory to the government" and that its purpose "is to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defense." The opinion adds, however, that since the statute is for the benefit of the defendant, he may doubtless waive it (p. 304). See also *Hickory* v. *United States*, 151 U. S. 303. The *Logan* decision is not determinative here, since the Court found it unnecessary "to consider how far, had the government delivered to the defendants, as required by the statute, lists of the witnesses to be produced for proving the indictments, particularly witnesses, afterwards coming to the knowledge of the government, or becoming necessary by reason of unexpected developments at the trial, might be permitted, on special reasons shown, and at the discretion of the court, to testify in the case" (p. 306).

In the instant case there is not, and indeed could not be, any claim of unfair surprise or prejudice resulting from the failure to include the names of Jones and Larkin in the long list of witnesses furnished petitioners. In respect of each of them petitioners' counsel admitted at the time he interposed his objection to permitting the witness to testify that the witness had testified at petitioners' pre-

liminary hearing (T. 43, 151). When asked by the court whether he knew that Jones was a material witness, petitioners' counsel stated, "We are relying on the code" and "We did not know his [Jones'] name was not on this list until we checked it just now" (T. 43).

In addition, during the course of the trial, while the examination was being conducted before the court to determine the question of the admissibility of petitioners' confessions, and before Larkin was called, petitioners' counsel inquired whether Larkin was present, and was informed that he was (T. 72). It seems clear, therefore, as the trial court said in overruling petitioners' objections, that petitioners had notice before trial that Jones and Larkin were material witnesses (T. 43, 151). Consequently, as the court below pointed out (123 F. (2d) 853), petitioners' contention is predicated solely upon the "technical applicability of the statute." There was, we submit, substantial compliance with the purpose and intent of the statute, for petitioners were furnished with the names of all but two of the witnesses called by the Government, and the testimony of these two was merely cumulative. In the circumstances, there was no abuse of discretion in permitting Jones and Larkin to testify. Cf. *Hickory* v. *United States*, 151 U. S. 303, 307–308; *Logan* v. *United States*, 144 U. S. 263, 306; *United States* v. *Schneider*, 21 D. C. 381. In any event, the omission of their names from the

list was, as the court below held (123 F. (2d) 853-854), merely a defect which did not affect the substantial rights of petitioners and must, therefore, under Section 269 of the Judicial Code (28 U. S. C. 391), be disregarded.

2. Although petitioners do not emphasize the point above the others they present, the principal question posed by the petition for writ of certiorari is whether petitioners' admissions were voluntary (Pet. 4–5, 9).

As appears from the Statement, there was a decided conflict in the evidence as to whether petitioners were threatened, cursed, assaulted, deprived of food and informed that the officers "would be lighter on them" if they told the truth. Likewise, there was dispute as to whether petitioners were told that they need not answer questions. The District Judge, who had the opportunity of observing the defendants and the officers while they were testifying, resolved these conflicts in the evidence against the defendants and the defendants chose not to bring this aspect of their case before the jury. We assume, therefore, that there is to be laid aside any claim of coercion predicated upon this portion of the evidence. *Lisenba* v. *California*, 314 U. S. 219, 239.*

* With an exception, later discussed in this footnote, it should be observed that petitioners urge only the following grounds for their contention in their petition for a writ of certiorari: The locking up of Raymond and Freeman,

There then arises the question whether petitioners' statements were involuntary because of certain undisputed facts, a question which was resolved against the petitioners not only by the trial judge but by the jury under comprehensive instructions. A discussion of the undisputed facts follows:

(A) Raymond and Freeman were held in a room in the Federal Building at Chattanooga, which had neither beds nor chairs, from early in the morning of August 1 until 5 o'clock in the afternoon of that day.[9] But neither Freeman nor Raymond testified that he suffered any discomfort for that reason. (T. 100–101, 104–105). They concede that they were not questioned until after they had been taken to the jail and returned to the Federal Building (Pet. 4, but see T. 100 as to Freeman). We share the District Judge's disapproval of the boys' detention in a room of this nature (T. 115), but, like him,

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shortly after their arrest, in the detention room of the Federal Building; the duration of the questioning; petitioners were "surrounded by approximately 15 agents of the Internal Revenue service"; they "did not have friends, relatives, counselors or advisers present during said examinations"; Benjamin at one time during the examination was required to strip off all of his clothes; and petitioners were "poor, uneducated mountain boys" (Pet. 4). It was also asserted that petitioners Raymond and Freeman had nothing to eat before their removal from the detention room to the jail about 5 p. m. on August 1. It is a fair inference from the officers' testimony, we believe, that they disputed this (*supra*, p. 11).

[9] Benjamin did not surrender himself until August 2.

we find nothing which indicates that their free will was in any wise affected thereby.

(B) Benjamin was requested to strip off his clothing on one occasion during the questioning. Officer Taylor testified, however, that the officers had been told that Benjamin had suffered an injury while running through the woods, or had been hit by a stray shot, and that they had him remove his clothes for "about two minutes" to see if there were any marks on him (T. 112, 113, 114). Benjamin did not contradict the officers' story that they did not "parade him around" (T. 113). There is nothing to indicate that the incident was other than routine (T. 114, 134, 142, 149, 157, 169–170).

(C) Petitioners were mountain boys, poor and with little education. But it would seem that little if any weight should be given this element. They were tried at Chattanooga, only 12 miles from their home (T. 105) by a judge who, evidently, was familiar with the mountaineers.[10] His observation of the defendants, together with the fact that they lived not far from the city of Chattanooga and in close proximity to a main, much-traveled highway, led him to state that "they are not so ignorant as

[10] According to the Federal Reporter the case was tried by Judge Leslie R. Darr (123 F. (2d) 850), who, the Department records disclose, was appointed June 5, 1939, as District Judge for the Middle and Eastern Districts of Tennessee.

some people might think" and to conclude that "I think these boys had sense enough to know their rights," particularly since, as the proof convinced him, "they were advised of their rights" (T. 115–116).

(D) Petitioners did not have relatives, friends, or counsel present while they were being examined by the officers.[11] Preliminarily, it should be observed that there is nothing in their testimony, or otherwise, which discloses that they requested that any of these be present during the questioning (T. 101, 104, 106), and their own evidence reveals that they were not held incommunicado except during those periods when they were actually being questioned (T. 96–97, 12).[12] There is thus presented merely the bare question whether petitioners' statements, because they were elicited in response to questions by law enforcement officers, in the absence of relatives, friends and counsel, were, by reason of these facts alone, rendered inadmissible. That they were not is clear, we believe, from the decisions of this Court. *Watts* v. *United States*, 1, 14; *Lisenba* v. *United States*, *supra*, p. 240.[13] Cf. the earlier case of *Brown* v. *United States*, 168 U. S. 532.

(E) Although the officers' testimony is not as definite as might be desired, it appears that peti-

[11] See also T. 77, 85, 88, 110, 142–143.

[12] In the *Lisenba* case the confession was held voluntary even though, in violation of a state penal statute, the accused was refused the opportunity of consulting counsel (p. 235).

tioners Raymond and Freeman were questioned several times during the period between 4 p. m. and 9 to 12 p. m. on August 1, and that on August 2 from between 9 or 10 a. m. to about 2 a. m. the following morning all of the defendants were brought from the jail to the Federal Building from time to time and questioned intermittently, sometimes separately and sometimes together (*supra*, p. 12). Petitioners were not questioned for protracted periods of time (*supra*, p. 12) or by relays of officers,[5] and it must be assumed, in view of the findings in the District Court, that the questioning was not otherwise oppressive. None of the petitioners claimed that he was worn out by the interrogating, and there was, of course, an element of strength growing out of their close relationship to each other. Benjamin, who confessed to the actual shooting of Leeper, was questioned for comparatively short periods during only one day after voluntarily coming to the Internal Revenue offices; he did not deny that, after he learned that the other boys had changed their stories and implicated him, he told the officers to get pencil and paper, that he wanted

[5] Nowhere in the testimony of either petitioners or the officers does it appear that "At all times during the questioning the petitioners were surrounded by approximately fifteen agents of the Internal Revenue Service of the United States." (Pet. 5.) The evidence reveals only that several officers "were in and out" of the room in which petitioners were questioned (T. 62, 82, 91, 93), and that one or two of the officers did practically all of the interrogating (T. 62, 72).

to tell the truth. Moreover, it is significant that Freeman and Raymond were quite discriminate in their admissions, specifically denying Benjamin's statement that they urged him to shoot, and that, despite the alleged threats and intimidations, neither Barney nor Emuil, the acquitted defendants, made any incriminating statements (*supra*, pp. 4–5, 8, 9).

(F) The officers were investigating the death of a fellow officer.[14] But the District Judge, who heard the officers' testimony, specifically stated that "I appreciate the fact that they [the officers] would be somewhat agitated by the killing of a fellow officer, but I don't think from the weight of this testimony that the agents overreached themselves, or imposed upon these defendants." (T. 116.) Where there exists a factor as difficult as this to evaluate on appellate review, great weight must necessarily be given to the finding of the District Judge who heard the testimony.

[14] While a murder complaint was apparently not filed until the afternoon of August 2 (T. 108), the officers undoubtedly, because of what they knew and had been informed, clearly had adequate ground for arresting and holding petitioners for the liquor violation at least, and, in view of the circumstances, they would seem to have had enough basis for holding them for Leeper's murder. In any event, it is clear that even if petitioners' detention on the latter charge was initially unjustified, this did not of itself require exclusion of their admissions. Cf. *Lisenba* v. *California*, supra, pp. 231, 240.

In the instant case, as the court below stated (123 F. (2d) 852), "The record reveals no situation remotely comparable to the plight of the defendants depicted in *Chambers* v. *Florida*, 309 U. S. 227," upon which petitioners rely (Pet. 9). On the contrary, upon the record as a whole, we think it affirmatively appears that petitioners' admissions were made voluntarily.

3. Petitioners make the bare contention, without supporting argument, that the court below was in error in holding that there was any evidence to sustain their convictions of second degree murder (Pet. 5, 9). The contention is not made to depend at all upon an ignoring of petitioners' admissions. The evidence relating to the crime has been summarized at pages 2–5, *supra*, and has also been reviewed at length in the opinion of the Circuit Court of Appeals, in passing upon the contention (123 F. (2d) 855–857). That court's analysis of the evidence makes so apparent the lack of merit in petitioners' contention that further argument would not seem to be required.

CONCLUSION

The only question of any importance presented by the petition for writ of certiorari is whether petitioners' extra-judicial statements were admissible in evidence. For the reasons which we have stated, we believe that the decision of the Circuit Court of Appeals on this, as on the other two questions in

the case, is correct. However, the granting of certiorari in *Anderson* v. *United States*, No. 852, present Term, in which a similar question is presented, may make like action desirable in the instant case.

Respectfully submitted.

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No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1942

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the circuit court of appeals (R. 40–52) is reported at 123 F. (2d) 848.

JURISDICTION

The judgment of the circuit court of appeals was entered December 6, 1941. Rehearing was denied on January 8, 1942. A motion for leave to proceed *in forma pauperis* and a petition for a writ of certiorari were filed February 13, 1942. Both were granted June 8, 1942 (R. 53). The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioners' extrajudicial admissions were admissible in evidence against them.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of Tennessee of second-degree murder for the killing of Samuel Leeper while he was engaged in the performance of his official duties as an investigator of the Alcohol Tax Unit of the Bureau of Internal Revenue. Each petitioner was sentenced to imprisonment for a term of forty-five years. On appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgments of conviction were affirmed.

THE EVIDENCE AS TO THE CRIME

On the evening of July 31, 1940, Officers Leeper, Jones, Abrams, and Renick, attached to the Alcohol Tax Unit, drove with two informers to the McNabb

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In their petition for certiorari the petitioners contended that the trial court committed reversible error in permitting witnesses Jones and Larkin to testify, although their names were omitted from the list of witnesses furnished to the defendants in accordance with Section 1033 of the Revised Statutes, 18 U. S. C. 562. This contention has now been abandoned and, in any event, as shown in our memorandum in response to the petition, is wholly without merit. See also *Segurola* v. *United States*, 275 U. S. 106. Petitioners have also abandoned their contention that the convictions are not supported by the evidence, evidently because it is plain that, if their extrajudicial admissions were properly admitted, there was abundant evidence to support the verdict.

settlement in eastern Tennessee in order to arrest members of the McNabb family for delivering whisky on which internal revenue taxes had not been paid (T. 24–25, 27, 29, 41–44, 46).[2] About one hundred yards away from the meeting place the officers got out of the car (T. 25, 29). The informers drove on and met the petitioners Benjamin, Freeman, and Raymond McNabb, and two other McNabbs, Emuil and Barney, who were tried with petitioners but acquitted[3] (T. 25). While the whisky was being loaded into the car, out of the nearby McNabb cemetery, someone called a warning (T. 25, 30, 38). One informer flashed a prearranged signal with his light and the officers ran toward the car; Officer Jones called in a loud voice, "Alright boys, Federal Officers." (T. 25, 26, 30, 34–35, 38, 41, 44–45, 55.) The informers drove off (T. 25, 35, 45). The McNabbs began running at Jones' outcry and disappeared (T. 30–35, 38).

The officers began at once to spill the whisky on the ground, using their flashlights to see (T. 30, 35–36, 38, 46). While thus engaged, a good-sized rock was thrown in their midst (T. 36, 38) and presently they heard someone mumbling over at a

[2] Only that part of the record has been printed which contains the evidence heard in the absence of the jury on the admissibility of the petitioners' extrajudicial admissions. It will be designated by the letter "R." The designation "T." refers to the typewritten transcript filed with the Clerk.

[3] The court, with the consent of the Government, directed verdicts of not guilty as to Emuil and Barney McNabb (T. 183).

little gate near a corner in the cemetery (T. 31, 36, 41). Shortly thereafter Leeper, who had gone inside the cemetery, was shot (T. 31, 36, 38, 39, 45). Renick went to his assistance and after a few minutes he, too, was shot (T. 31, 39). Renick recovered, but Leeper died (T. 9, 32).

After their arrest the petitioners made admissions which were accepted as evidence at the trial. Benjamin made the following statements: He helped to load the whisky and that it was he, as he ran, who stopped and threw the rock at the officers (T. 130, 147, 153, 163, 170). At a small gate in a corner of the cemetery he met Raymond and Freeman. Freeman handed him a shotgun and both Raymond and Freeman urged him to go and shoot at the officers. Accordingly, he went to a point where his view was unobstructed and fired a shot at the flashlights. After firing he reloaded with a shell which Freeman gave him and gave the gun to Freeman or Raymond. As he left, he heard a second shot. (T. 118, 130, 134, 137–138, 142–143, 148–149, 153–154, 161, 163.)

Freeman admitted that he had made the arrangements for the sale of the liquor and had shouted the warning (T. 129, 133, 138–139, 141, 156, 166–167, 169). He also admitted that he had carried the shotgun to the cemetery intending to shoot anyone who attempted to take his whisky (T. 129, 138, 140), that he had witnessed the shooting, and that he had given Benjamin another shell with which to reload the gun (T. 154); but he in-

sisted that he had told Benjamin not to shoot because "they were officers down there" (T. 153).

Raymond admitted that he had met Benjamin and Freeman at the corner of the cemetery and that he was present when Benjamin was given the gun and when the shot was fired by Benjamin (T. 118, 138, 139, 156). At first Raymond said that Benjamin had fired two shots but later stated that Benjamin had fired only one (T. 166). He denied that he had urged Benjamin to "Pour it on them" (T. 153, 166).

THE EVIDENCE AND FINDINGS AS TO THE CIRCUMSTANCES UNDER WHICH THE ADMISSIONS WERE MADE

To determine whether the admissions made by the three petitioners were admissible in evidence, the trial court conducted a preliminary examination in the absence of the jury (R. 1, 3). From the testimony adduced it appeared that the statements were made under the following circumstances:

Freeman McNabb and Raymond McNabb were arrested,[1] together with their brother Emuil, at one or two o'clock on the morning of August 1, 1940,

[1] Petitioners assert that the officers arrested Freeman and Raymond without "a complaint or warrant of any kind" (Br. ——). The record does not show whether a warrant of arrest had been obtained, but it is clear that, in any event, the arrests were lawful since both of them were seen at the scene of the crime (*supra*, p. 3), thus giving the officers probable cause to believe that Freeman and Raymond participated in the commission of a felony which was in fact committed. See Michie's Tennessee Code of 1938, § 11536, and 18 U. S. C. 550.

and were taken to a detention room in the Federal Building in Chattanooga, Tennessee (R. 28, 29, 31). The room was bare of any cot, chair, or stool (R. 13). They were left there until four or five o'clock, in the afternoon without being questioned and then were taken to the Hamilton County jail (R. 12, 28, 29, 32). During the day they had been given sandwiches to eat (R. 13).[5] Barney McNabb was taken into custody in the morning; he was questioned by the officers and taken with them when they went over the scene of the crime (R. 2, 30).

When they were arrested, the defendants volunteered to make statements (R. 9) and consequently in the late afternoon or evening of August 1 the officers began to question some of them.[6] Officer Taylor, who was in charge and did most of the questioning (R. 4, 11, 28, 36, 37), testified (R. 34):

> I told each of them before they were questioned that we were Government Officers, what we were investigating, and advised them they did not have to make a statement,

[5] Freeman and Raymond both testified that during this period they were given nothing to eat (R. 28, 29, 32). But the resolution of this and other conflicts in the testimony was for the trial judge. See Brief for United States in *Anderson v. United States*, No. 10, this Term, p. 57. In setting forth the facts, therefore, we shall resolve all conflicts in favor of the Government but shall indicate the testimony of the petitioners either in the text or a note.

[6] We shall use the term "defendants" to describe all five who were defendants at the trial, including the three petitioners, and will refer to the petitioners as such when there is reason to distinguish them from Barney and Emuil.

> that they need not fear force, and that any statement made by them would be used against them and that they need not answer any questions asked unless they desired to do so, and I asked each of them if the [sic] understood that. I talked to each of them individually and each of them said they so understood. I told them that if they did answer the question to tell the truth, but that they had a right to refuse to answer if they wished. After they understood what I had told them I then proceeded with the questioning. * * *

Officer Beman, who was present whenever Raymond was questioned (R. 8, 26) and who took Benjamin's confession (T. 146), also stated that the defendants' constitutional rights were explained to them (R. 7).[7]

The questioning on the evening of August 1st may have lasted until some time around midnight (R. 19, 34, 36).[8] The defendants were

[7] The defendants denied that they were advised of their rights (R. 28, 29, 32, 33).

[8] Two of the officers so testified, but Officer Kitts stated that the questioning began at 7 and ended around 10 (R. 14) and Officer Burke stated that different defendants were questioned at different times from 6 until 11 (R. 22). Emuil testified that he and his brothers, Freeman and Raymond, were "kept" in the Alcohol Tax Unit office that evening for three or four hours, until 9 or 9:30, during which time some one "talked" to him (R. 28). Taking into account Barney's obvious confusion as to dates and his erroneous assumption that he was in custody three days before the final interrogation, his testimony was that

brought in individually at various times and questioned "some of them half an hour or maybe an hour, or maybe two hours" (R. 14, 19, 22). The evidence does not reveal how long any particular defendant was questioned that evening. Officer Beman stated that Raymond was interrogated for about half an hour that day (R. 7).[9] Freeman, according to his testimony, was brought from the jail for questioning "two or three times, some in the afternoon and some at night" (R. 29).[10]

On the following day, August 2, the questioning was continued. Officer Taylor testified, "I had

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he was kept at the federal building that night from 8 or 9 o'clock to 10 or 11 (R. 30).

[9] According to Raymond's testimony, he was questioned only once, *i. e.* between 11 at night and 2 or 3 in the morning (R. 32). Raymond testified that this was on the night of August 1, but it seems that he was confused as to dates for these hours correspond to the hours on the night of August 2 during which the defendants were questioned.

[10] Freeman's testimony as to the periods he was kept at the federal building is contradictory and confusing. The first occasion on which the defendants were questioned was in the late afternoon of August 1st and they were not questioned after 2 or 3 o'clock in the morning of August 3. But Freeman testified that he stayed in the detention room until late the evening of August 1st, was then brought downstairs and questioned, taken to the jail, brought back after an hour, and taken back to the jail at 11 o'clock. He also testified immediately thereafter that "They brought me back two or three times, some in the afternoon and some at night." As to August 2nd he said that he was kept at the federal building from about 7 at night until "long after midnight," and that the next night (August 3rd) the officers came to the jail and got them at 11 o'clock and questioned them until 2. (See R. 29.)

them back down the next day, probably about nine or nine-thirty. We had them back and forth most of the day. I questioned four of them practically all day" (R. 36; see also, R. 15–16, 19–20, 22). On this day, as during the previous evening, no one was questioned continuously but only intermittently for 20-minute or half-hour periods (R. 7, 20, 22, 26). Taylor would question one, send him back, try to reconcile the facts, and then question another (R. 35). The stories of the defendants "did not fit with the physical facts, and statements of their own crowd," so the officers "would put two of them together" and "they [the defendants] could not reconcile their differences" (R. 35). It is difficult to break up the questioning among the defendants. Barney testified that he was taken to the Federal Building for questioning at 8 or 9 and was kept there until noon (R. 30). Raymond, according to Officer Beman, was questioned "probably three times" during the day for "probably 15 or 20 minutes or half an hour at a time" (R. 7, 8). Freeman did not mention that he was questioned that day and the officers were not asked about him specifically. Early that evening, however, Freeman was questioned for about three and one-half hours (R. 36).

Benjamin came to the Federal Building with his parents and two friends on the morning of August 2 and declared that he wanted "to make an explanation of his whereabouts on the day before" (R.

14, 25, 26, 27). The officers first asked him to remove his clothes, which he did, and they examined him for two or three minutes to verify a report they had that he had been injured by a stray shot (R. 36, 37); Benjamin testified that this scared him "pretty much" (R. 33). The officers then took down his statement (R. 26). Later, about noon, he was confronted with the accusation made by the others that he had fired both shots (T. 134, 146–149, 162–164, 169).[11] Immediately, Benjamin confessed, saying (R. 26):

> If they are going to accuse me of that, I will tell the whole truth, you may get your pencil and paper and write it down.

He explained that he had told a false story at first because the defendants "made an agreement to tell they were not about the graveyard on that night and they agreed to stick to it" (T. 143). After

[11] Benjamin denied that he had made such a statement (R. 33).

[12] It seems likely that it was Barney's written statement with which Benjamin was confronted (T. 146; cf. T. 155–156). That Barney accused Benjamin of shooting both shots is disclosed by the officers' testimony that Benjamin admitted seeing Barney right after the shooting (T. 164) and that Barney, on August 1, said "he had been told by other persons what had happened" (T. 159) and that after he heard the shots that night "one other person [Benjamin] came to the river and told him that he, this person [Benjamin] who came to the river, had done the shooting" (T. 160). (The word "person" was used by the officers when testifying to avoid mentioning the defendants' names if they had not been present when incriminating statements were made as to them.)

Benjamin had been warned again of his constitutional rights (T. 162), he made a detailed statement, marking his movements on a map, in which he confessed his part in the crime, admitting that he fired the first shot but denying the accusation that he also fired the second shot (see p. 4, *supra*). The confession was taken down by a stenographer in question and answer form while Officer Beman asked the questions. (T. 146, 169).[13]

About ten or eleven o'clock that night all the defendants were brought back from the jail to the Federal Building and questioned again, sometimes separately and sometimes together (R. 7–8, 16, 17, 22–23, 35). Officer Beman explained (R. 9):

> There were certain discrepancies in their stories, and we were anxious to straighten them out, and the best way to do it was to get all five of them together, they all having stated they were anxious to tell the truth about it. That was the reason for bringing them down the last time.

They were kept for two, and possibly three, hours,[14] "discussed the whole affair among themselves" (R. 35), and made statements which were consistent

[13] The record does not show why the written confession was not introduced in evidence but we are informed that it was not introduced because it was not signed by Benjamin.

[14] Officers Jakes and Kitts testified that the defendants were kept at the Federal Building from about ten until around midnight or after (R. 16, 20, 22, 23); Officer Beman stated that Raymond was sent back to the jail at nine or ten and later brought back to the Federal Building and kept there until between one and two (R. 7–8). The de-

with each other and with facts known to the officers (R. 9, 23). In brief, Benjamin, who had already made a complete confession, did not change his story. Freeman and Raymond admitted that they had been present at the shooting; Freeman also admitted that he had taken the gun to the graveyard to shoot anyone interfering with the sale of the whisky, and that he had given Benjamin a shell with which to reload (see pp. 4–5, *supra*). But Freeman and Raymond were cautious in their admissions. Both contradicted Benjamin's statement that they had urged him to shoot (T. 153, 166) and Freeman insisted that he had told Benjamin not to shoot because "they were officers down there" (T. 153). Barney described the events preceding the shooting but said that he had left the scene when the officers cried out to them (T. 130–131, 151–152, 159). Emuil made no admissions (T. 141).

During the time that they were actually being questioned the petitioners did not see their families or friends. On one occasion some relatives and a friend were denied leave to see Freeman and Raymond when they were in the detention

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fendants set the time somewhat later and the period a little longer: Freeman said he was questioned from eleven until two, but was kept until three or three-thirty (R. 29); Raymond and Barney said they were brought down around eleven and kept until between two and three (R. 30–31, 32). Benjamin testified merely that he had something to eat and played a pin ball machine in a restaurant "on the way to jail" that night "some time around three o'clock (R. 33–34).

room (R. 27). But there was evidence that relatives of the petitioners were in an adjoining room during the questioning (R. 23, 27). And although the record is not clear, it seems that the petitioners were allowed to see their families at the jail when they were not being questioned (R. 27, but see R. 36). The petitioners did not have the benefit of counsel (R. 29, 33, 36) but there is no evidence that they requested counsel.

The testimony was conflicting as to whether any promises or threats were made and as to whether petitioners were subjected to abuse and violence. Freeman and Raymond testified that they were told that they would be given light sentences and allowed "to make bond" if they confessed (R. 29, 32). Benjamin testified that the officers told him that if he told the truth "they would make it lighter on me, but if I didn't they would burn me up in the electric chair" (R. 33). The three officers who, between them, did all of the questioning—Taylor, Beman and Kitts (R. 7; 14, 15; 36, 37)—testified, however, that no promise or inducement or other reward was offered to petitioners (R. 2-3, 8, 23, 26, 37). Likewise, the officers denied the assertions (R. 29, 32; 33) that they had cursed and abused the petitioners and threatened them with physical violence (R. 2; 8, 9, 10, 18, 23, 34, 35, 37). There was evidence that the officers gave the petitioners sandwiches, coca-colas, and cigarettes during the questioning and that on several occasions

the officers took them across the street "to buy what they wanted" (R. 2, 16, 18, 20, 35, 36).[15] And there is no suggestion that their regular meals were not served them at the jail.

All three petitioners have lived in the McNabb community all their lives, have gone through only the fourth grade in school, and have been no farther away from home than Jasper, Tennessee, twenty-one miles away (R. 29–30, 31–32, 33). However, Chattanooga is only twelve miles from their home (R. 33), and Raymond said that he had been there "a good many times" (R. 32); Freeman, his twin, was not asked whether he had been there. Benjamin also has been to Chattanooga but did not specify how many times (R. 33). Raymond and Freeman had been in court previously, when, represented by counsel, they pleaded guilty—Freeman to manufacturing whisky (R. 30, 32).

Immediately after the Government's second witness was called to the stand and sworn,[16] the trial judge declined to hear further testimony, stating,

> I think I have a fair picture of the situation * * * and I feel this way about it; * * *. I don't see anything in this case that I could particularly disapprove except the fact these boys were put in this detention room without any seats, or without any beds,

[15] The petitioners partially denied this (R. 28, 29, 30, 32). Several of the officers had already been called as witnesses by the defendants.

and left there for some time, but I cannot see that within itself would effect [sic] their free will, or any statement they might have made (R. 38).

He also stated that (R. 38):

> In this case, from the way I see the proof, there was no questioning that would show the will of these defendants was entirely overreached. It is true that they are boys, live in the country, have not been far away from home, but it is also true that they are not entirely ignorant of the affairs of life, they have lived close to a main highway, lots of people travel, lots of people stopping along there; they have been in Chattanooga, and they are not so ignorant as some people might think. I think these boys had sense enough to know their rights, and I think the proof shows they were advised of their rights.

With reference to counsel's inquiry, "What would Your Honor think was the reaction to these midnight sessions?" the court replied (R. 38–39):

> I don't think there was any physical discomfort, it only lasted two days, I don't think that there [sic] would effect their free will. There are several elements to be considered, one is the personal element of the officer making the investigation; they are men engaged in the enforcement of the law, and have to deal with this character of crime, their line of duty does not demand that they high-pressure anybody. I appreciate the fact they would be some-

> what agitated by the killing of a fellow officer, but I don't think from the weight of this testimony that the agents overreached themselves, or imposed upon these defendants. * * * in this case I cannot see there has been any high-pressure brought on these defendants, which would override their will. I do not think they were promised immunity or reward. I cannot see any of that in this case. * * *
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> * * * * * *
>
> It is my judgment that any statements made by any of these defendants, under the conditions as submitted to the Court, are admissible in evidence. * * *

When the jury was recalled, the defendants did not take the stand to relate their version of the circumstances under which their admissions were made, and their counsel contented themselves with cross-examining the officers as to such circumstances. The testimony of the officers before the jury is substantially a repetition of that given by them on the preliminary examination. (See T. 118–119, 122, 131, 133, 141–144, 147–150, 155–156, 157, 167–170; see also T. 58–60.)

SUMMARY OF ARGUMENT

I

The trial court did not err in admitting evidence of the incriminating statements made by the petitioners. The testimony was conflicting as to whether the petitioners were made to understand their rights, or were subjected to physical

violence, or cursed, abused or threatened, or offered any inducements or promises in return for their admissions. There was abundant evidence to support the trial court's findings on these issues, and they may therefore be laid aside. *Lisenba* v. *California*, 314 U. S. 219. The questioning of Freeman and Raymond was not unduly protracted, and there is no reason to suppose that their wills were overreached. It was quite clear that Benjamin told the truth voluntarily in order to repel accusations made against him.

ARGUMENT

PETITIONERS' ADMISSIONS WERE ADMISSIBLE IN EVIDENCE

In our brief in *Anderson* v. *United States*, No. 10, this Term, we have discussed at length the tests which we believe should govern the trial courts in passing upon the admissibility of a confession. We have shown that the trial judge should inquire whether the confession was "voluntary," an idea which summarizes two overlapping criteria. The first is whether the circumstances were such that the defendant's normal will not to accuse himself falsely was overcome by threats, promises or mistreatment, thus rendering his involuntary statement too unreliable for evidence. The second is whether the defendant's constitutional right to refuse to answer incriminating questions was denied him by applying compulsion to extort an answer

or by asking questions which were themselves coercive at a time when through fear or physical debility the defendant was bereft of power to assert his will. Although we urge that even if it examined the facts *de novo* the Court should conclude in these cases that the confessions were made voluntarily, we have also pointed out that the appellate court has a limited function, and that the trial judge must have a wide discretion to make his ruling, because the ultimate question of whether an extra-judicial confession was voluntary in the above senses is a question of fact which the trial judge has a far better opportunity to answer wisely than any appellate court. For the purposes of this brief we refer to that discussion for our position upon the questions of law, and enter straightly upon consideration of the ultimate factual questions.

We may lay aside at once the claims of the petitioners that they were bullied, threatened, cursed and offered promises of reward. Their testimony was contradicted by the officers (see pp. 13–14, *supra*). Likewise, the testimony of the officers establishes that the petitioners were made to understand that they need not answer questions or otherwise incriminate themselves. The court resolved the conflicts in the evidence against the petitioners and its decision on these issues is final since it is abundantly supported by the evidence. Cf. *Lisenba* v. *California*, 314 U. S. 219; *Ward* v. *Texas*, No. 974, last Term.

In the instant case, therefore, the only substantial question in respect of all three extrajudicial admissions is whether the questioning, while neither friends nor counsel were in the room, was so protracted and was carried on at such late hours as to wear down any of the petitioners so that he "was no longer able freely to admit or to deny or to refuse to answer."[17] The circumstances relevant to each confession vary sufficiently to require separate treatment. We submit, however, that in each instance they show the ruling of the trial court to be correct.

1. *Benjamin.*—The decisive fact showing Benjamin's confession to have been voluntary is that Benjamin spoke not from a sense of oppression, fear, or coercion, but deliberately in order to repel the accusations made against him by Freeman and Raymond. Officer McKinney in his testimony epitomized the way in which Benjamin came to confess (R. 26):

> Benjamin McNabb came to the Alcohol Tax Office voluntarily sometime before noon on the morning of August 2nd and said that he wanted to make an explanation of his whereabouts, and his statement was written down. Later he was confronted with the statements made by the other boys, in which the other boys had accused Benjamin of firing both shots. Benjamin thereupon said, "If they are going to accuse me of that,

[17] *Ward v. Texas*, No. 974, last Term, pamph. p. 7.

I will tell the whole truth, you may get your pencil and paper and write it down." * * *

Benjamin made his decision to confess about noon (T. 134, 146–149, 162–164, 169) and much of the five or six hours during which, according to his testimony, he was being questioned must have been consumed in reducing his confession to writing (T. 169).

Moreover, Benjamin was advised of his rights and told that he need not make any statement unless he wished (R. 34, 38); he was lawfully held in custody; there was no delay in arraignment preceding his confession; he was not held incommunicado except while he was actually being questioned; his family was in the building;[18] he never requested counsel and confessed before he had been in custody many hours.

The mere fact that Benjamin and his co-petitioners "were ignorant mountain boys, none of them having been further than the 4th grade in school and none of them having been more than 25 miles away from home before they were arrested" (Br. 5), presents no serious question as to the voluntariness of his confession. He at all times showed self-possession in making his confession; he denied parts of his confederates' accusations (R. 26) and was able to state the details of his stories minutely and to mark his move-

[18] See p. 13, *supra*.

ments on a map (T. 161–164). His claim that he was scared "pretty much" when he was asked to take off his clothes for two or three minutes, is inconsistent with the readiness with which he gave his first false statement. Moreover, there is nothing to indicate that this incident was anything more than routine, and it must be considered in the light of the findings of the trial judge who saw Benjamin and heard him testify. The court said (R. 38):

> In this case, from the way I see the proof, there was no questioning that would show the will of these defendants was entirely overreached. It is true that they are boys, live in the country, have not been far away from home, but it is also true that they are not entirely ignorant of the affairs of life, they have lived close to a main highway, lots of people travel, lots of people stopping along there; they have been in Chattanooga, and *they are not so ignorant as some people might think. I think these boys had sense enough to know their rights, and I think the proof shows they were advised of their rights.* [Italics supplied.]

2. *Raymond.*—Raymond was arrested at one o'clock in the morning of August 1st and was kept all day in the detention room (R. 12, 31–32). Like the trial judge, we disapprove of the conduct of the officers in detaining the defendants for fifteen hours in an unfurnished room. But the

circumstance is unimportant here because Raymond was not questioned for more than half an hour until he had had an opportunity for a full night's rest (see pp. 7–8, *supra*).

Except for the initial detention, the circumstances bearing upon the voluntary or involuntary character of Raymond's statements present nothing unlawful or improper. Officer Berman testified that he was present whenever Raymond was questioned and said that Raymond was questioned for "probably half an hour" on the afternoon of August 1st and "probably three times" for "probably 15 or 20 minutes or half an hour at a time" during the day on August 2nd and again between eleven and two o'clock that night (R. 7–8). It is clear, therefore, that the questioning did not last so long as to wear down Raymond's resistance and the late hour at which he was questioned on one night was certainly justified by the necessity of investigating the murder promptly. Morever, Raymond has never even suggested that he was tired by the questioning.

Whatever intangibles may have arisen from Raymond's inexperience were, as in Benjamin's case, peculiarly for the trial judge to weigh in the light of his observation of the petitioners. Plainly the record does not show that Raymond was deprived of his freedom to admit, deny, or remain silent, or that he was willing to say what the officers desired. On the contrary, even when he made in-

criminating admissions, he was careful to deny the accusation which would have seemed to him most damaging—that he urged Benjamin to "Pour it on them" (T. 153, 156).

3. *Freeman.*—Freeman was arrested at one o'clock on the morning of August 1st, about four hours after the shooting, and was taken to the Federal Building in Chattanooga and left in the unfurnished detention room until four o'clock that evening (R. 29). Between five o'clock and eleven he was kept at the Federal Building for examination but, although neither he nor the officers made it clear how much of that time was spent in questioning him, he was questioned only intermittently (see pp. 7–8, *supra*).

Although the record is not explicit, it is probable that Freeman was questioned during the daytime on August 2nd for not more than half an hour at a time (R. 36). Early that evening he was interrogated for three and a half hours (R. 36) and was brought back from the jail along with the other defendants later that night (R. 29). With reference to the early evening session, Officer Taylor testified (R. 36):

> We had Freeman McNabb on the night of the second for about three and one-half hours, I don't remember the time but I remember him particularly because he certainly was hard to get anything out of. He would admit he lied before and then tell it all over again. I knew some of the things

> about the whole truth and it took about three and one-half hours before he would say it was the truth, and I finally got him to tell a story which he said was true and which certainly fit better with the physical facts and circumstances than any other story he had told. It took me three and one-half hours to get a story that was satisfactory * * *.

In other words, Taylor's testimony describes the questioning of a man who said that he was glad to answer questions but who would admit that he lied and would then repeat the lie over again. Such a man would be aptly characterized as "hard to get anything out of" and explains why Taylor continued to question him for three and a half hours. Thus, it appears that after Freeman realized the incredibility of his false story in view of the known physical facts and its inconsistency with the versions given by the other defendants, he decided to tell a consistent story which he believed would not at the same time incriminate him. Hence, he at no time admitted Benjamin's statement that he had urged Benjamin to shoot, and insisted that he told Benjamin not to shoot because "they were officers down there" (T. 153). Freeman's self-possession in minimizing his part in the crime goes far towards showing that he remained a free agent; if words were being put in his mouth because he was too tired to deny them, he would doubtless have also been forced to admit Benjamin's accusation.

Furthermore, Freeman's failure to complain either of lack of sleep or of the length of the questioning strongly suggests that he believed that he had no cause to complain on those accounts. And, his silence on the point also suggests the possibility that he was strong enough not to suffer from lack of sleep and phlegmatic enough not to be upset by the intermittent questioning.

Accordingly, it cannot be said that the trial judge acted against the weight of the evidence in finding that Freeman's statements were voluntary and therefore admissible. His situation compares favorably with that of the defendant James in *Lisenba* v. *California*, 314 U. S. 219. James had been questioned constantly for 8 or 12 hours whereas Freeman had been questioned for only three and one-half hours on that day and intermittently during a six hour period the day before. Freeman, like James, showed self-possession in making his confession; he denied parts of his confederates' accusation. Neither James nor Freeman had the assistance of counsel when they made their incriminating admissions, although James had requested counsel and Freeman did not. Freeman was held with close relatives and friends for only two days and was held lawfully whereas James had been in custody two weeks at times in violation of law. The decisive circumstance, however, is that Freeman had no period of torture to recall during the final ques-

tioning whereas on the previous occasion, James had been subjected to 42 hours of constant questioning. The ruling that Freeman's confession was admissible is correct, therefore, under the authority of *Lisenba* v. *California, supra.*

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

OSCAR A. PROVOST,
MELVA M. GRANEY,
ARCHIBALD COX,
Attorneys.

OCTOBER 1942.

No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1942

BENJAMIN McNABB, FREEMAN McNABB, AND RAYMOND McNABB, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING

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MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Comes now the respondent, the United States of America, by the Solicitor General, and respectfully prays leave to file the attached petition for rehearing in this case.

CHARLES FAHY,
Solicitor General.

PETITION FOR REHEARING

Comes now the Solicitor General on behalf of the United States and respectfully prays that the

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mandate heretofore issued in this case be recalled, that the judgment entered on March 1, 1943, be vacated, and that a rehearing be granted.

In this case Benjamin, Freeman, and Raymond McNabb were convicted of second-degree murder for the killing of a federal officer while he was engaged in the performance of his official duties as an investigator of the Alcohol Tax Unit of the Bureau of Internal Revenue. The convictions rested largely upon incriminating admissions made by these defendants during the two-day period following the homicide. In the trial court, the circuit court of appeals, and in this Court, the defendants contended that the admissions were coerced from them by federal officers and were therefore involuntary and inadmissible against them. This Court granted their petition for a writ of certiorari and reversed their conviction on the ground that the admissions were inadmissible in evidence because obtained while the defendants were confined by officers of the Alcohol Tax Unit in "plain disregard of the duty enjoined by Congress upon federal law officers" to take the persons arrested before a committing magistrate. In its opinion, the Court said: "The record leaves no room for doubt that the questioning of the petitioners 'took place * * * before any order of commitment was made." As the dissenting opinion observed, the Transcript of Record on appeal "does not show when the

petitioners were taken before a committing magistrate," obviously because no question had been raised as to the alleged tardiness of arraignment. Hence, we assume that the Court's statement was based on the information contained in the district court file of the McNabb murder case.

After the Court's decision was rendered, the Alcohol Tax Unit investigated the facts with respect to the arraignment of the defendants.

The United States Commissioner's record and the affidavits of former deputy United States Marshal Ricketts, Alcohol Tax Unit Investigator Jones, and United States Commissioner Anderson (see Appendix, *infra*, pp. 8–17)[1] reveal the following:

Freeman and Raymond.—Between 8:30 and 10:30 a. m. on the morning of August 1, 1940, Freeman and Raymond McNabb were formally arrested under a warrant charging them with violations of the Internal Revenue laws relating to liquor,[2] were arraigned before United States

[1] The originals of these affidavits and nine photostat copies of the United States Commissioner's record have been lodged with the Clerk of this Court. The affidavits and the pertinent portions of the United States Commissioner's records are copied in the Appendix to this petition.

[2] The homicide was committed in connection with violations by the defendants of the Internal Revenue laws relating to liquor, which were committed in the presence of the officers. Hence there can be no question as to the right of the officers to arrest them for those violations without a warrant. See summary of the evidence in our brief, pages 2–5, and in the Court's opinion. We are advised by the

Commissioner James H. Anderson, and were committed to jail in default of bail.[3] Since, as the Court's opinion shows, they had been taken into custody at one or two o'clock on that morning, their arraignment between 8:30 and 10:30 o'clock was a reasonable compliance with the Act of March 1, 1879, c. 125, 20 Stat. 327, 341 (18 U. S. C. 593) and the other arraignment statutes referred to in the Court's opinion. Although Freeman and Raymond were thereafter interrogated relative to the murder while they were in legal custody for a violation of the liquor laws, we submit that such interrogation violated no statute or principle enunciated by this Court in its opinion in the case.[4]

United States Attorney that each of the defendants entered pleas of guilty in the liquor cases, was sentenced to imprisonment for eighteen months, and these sentences have been executed.

[3] That the Commissioner's records represent more than a "paper transaction" and that the defendants were actually physically brought before the magistrate, is unequivocally shown by the affidavits. The filing of this motion was delayed because we did not wish, under the circumstances, to rely upon the Commissioner's records alone, and there was difficulty in obtaining the affidavit of the former deputy marshal, who is now in the Army.

[4] The documents set forth in the Appendix show that on the morning of August 2, 1940, Freeman and Raymond were formally arrested under a warrant charging them with the murder of Investigator Leeper, were physically arraigned before United States Commissioner James H. Anderson, and were committed to jail in default of bail; and that a formal hearing was held on these charges on August 8, 1940, and the defendants were committed to jail and held for the action of a grand jury.

Benjamin.—The record shows that Benjamin McNabb voluntarily came to the Alcohol Tax Unit office in Chattanooga, Tennessee, on the morning of August 2, 1940, declaring that he wanted "to make an explanation of his whereabouts on the day before" [5](R. 14, 25, 26, 27) and that the officers took down his exculpatory statement, which was false, asked him to remove his clothes and examined him for two or three minutes to verify a report they had that he had been injured by a stray shot (R. 26, 36, 37; T. 143). There is no direct evidence that he was questioned during the morning. His confession came at noon or thereafter, when he was confronted with the others' accusations against him (R. 26; T. 134, 146–149, 162–164, 169).

The documents set forth in the Appendix, *infra*, unmistakably show that sometime during that morning Benjamin had been formally arrested, along with Freeman and Raymond, under a warrant charging him with murder, physically arraigned before the United States Commissioner, and committed to jail in default of bail. It therefore appears that there was a strict compliance with the arraignment statute, that Benjamin had been arraigned before he made his confession and, it must be assumed from the record showing, before he was questioned by the officers.

[5] The evidence was conflicting as to whether Benjamin made this statement; he denied making it (R. 33).

While the fact that the defendants' admissions were made when they were in lawful custody removes the factual premise upon which the Court's opinion appears to be based, it does not, of course, finally dispose of the case. The defendant's contention that the admissions were involuntary—the contention they raised on certiorari—remains. If their admissions were voluntary, the orderly administration of justice requires that the judgment of conviction should be now affirmed. To require the facts herein shown to be adduced before the District Court would result in the granting of a new trial, and should the defendants again be convicted, this Court would undoubtedly be called upon once more to determine the voluntariness of their extra-judicial admissions. The failure of the parties to incorporate such facts in the record on appeal is explained, we believe, by the circumstance that it had been assumed throughout the case that unlawful detention of the accused did not of itself render a confession involuntary (cf. *Lisenba* v. *California*, 314 U. S. 219, 234, 240), and the rule that admissions made while the defendant is held in illegal custody are inadmissible had not been enunciated by any Federal court until the decision in this case. Rehearing is therefore sought because we believe it appears that the admissions made by the defendants were properly admitted in evidence

under the rule laid down by this Court in this case, leaving for decision their admissibility under the usual tests of voluntariness.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

I certify that this petition is presented in good faith and not for delay.

CHARLES FAHY,
Solicitor General.

MAY 1943.

APPENDIX

The pertinent portions of the United States Commissioner's records, Eastern District of Tennessee, Southern Division, read as follows:

United States of America, Eastern District of Tennessee, *ss*, Southern Division

No. 2909

The United States of America *vs.* Barney McNabb, Raymond McNabb, Freeman McNabb, Emil McNabb

Before me James H. Anderson, a United States Commissioner for said District, complaint and affidavit was made—warrant and certified copy of complaint was presented—on this 1st day of August, 1940, by J. D. Jones, Invr. A. T. U. charging in substance that on or about the 31st day of July, 1940, at Marion County in said District, the defendants, Barney, Raymond, Freeman & Emil McNabb, in violation of Sections 3253, 3221, 2833 (a), 2806 (f), 2810 (a), IRC, U. S. Code, did unlawfully operate unregistered distillery, possess and remove nontax paid spirits to a place other than warehouse; possess nontax paid distilled spirits in unstamped containers; sell.

Complaint approved by the U. S. District Attorney on_____, 19____.

On Aug. 1st, 1940, issued warrant to Henry R. Bell, U. S. Marshall, Barney, Raymond, Freeman, & Emil McNabb.

On Aug. 1, 1940, warrant returned, indorsed as follows:

"Received this warrant on the 1st day of Aug. 1940, at _____ and executed the same by arresting the within named Barney, Freeman, Raymond, & Emil McNabb at Chattanooga on the 1st day of Aug. 1940, and have their bodies now in court, as within I am commanded."

* * * * * *

On Aug. 1, 1940, defendants were brought before me, the said United States Commissioner, at my office, in the _____ in said District, by Coyel V. Ricketts, Deputy U. S. Marshal; and the complaint was then and there fully read and explained to the said defendants, who thereupon, for plea, said they is "not guilty" as charged in said complaint.

* * * * * *

And thereupon, on motion to that effect made by the Plaintiff, the hearing was continued until the _____ day of August, 1940, at 9 o'clock, A. M., and the defendants _____ were required to give bond in the sum of $500.00 to personally appear before me at the said time at Grand Jury Room in the City of Chattanooga, Tenn., and District aforesaid, and from time to time thereafter to which the case may be continued, which they did not do, with the following sureties: _____

Thereupon on the 1st day of August, 1940, I issued a temporary mittimus committing defendants McNabb's to the jail of Hamilton County, Tennessee, pending examination.

On Aug. 1, 1940, temporary mittimus returned indorsed as follows: "Received this MITTIMUS with the within named prisoner, on the 1st day of Aug. 1940, and on the same day I committed the said prisoner to the custody of the jail keeper named in said mittimus, with whom I left at the same time a certified copy of this mittimus. Dated Aug. 1, 1940. Henry R. Bell, U. S. Marshal, Eastern District of Tennessee. By Coyel V. Ricketts, Deputy."

United States of America, Eastern District of Tennessee, *ss*, Southern Division

No. 2913

The United States of America *vs.* Benjamin McNabb, Freeman McNabb, Raymond McNabb, Emil McNabb, Barney McNabb

Before me, James H. Anderson, a United States Commissioner for said District, complaint and affidavit was made—warrant and certified copy of complaint was presented—on this 2nd day of August, 1940, by R. S. Abrahams, Invr. A. T. U. charging in substance that on or about the 31st day of July 1940, at Marion County in said District, the defendants, Benjamin, Freeman, and Raymond McNabb in violation of Section 253, Title 18 U. S. C. A., U. S. Code, did unlawfully kill and murder Sam Leeper, Invr A. T. U.

Complaint approved by the U. S. District Attorney on_____19____.

On Aug. 2, 1940, issued warrant to Henry R. Bell, U. S. Marshal,_____.

On Aug. 2, 1940, warrant returned, indorsed as follows:

"Received this warrant on the 2nd day of Aug. 1940, at Chattanooga, Tenn., and executed the same by arresting the within named Raymond, Freeman, & Benjamin McNabb, at Chattanooga, on the 2nd day of Aug. 1940, and have their bodies now in court, as within I am commanded.

"Henry R. Bell, U. S. Marshal, Eastern District of Tennessee. By Coyel V. Ricketts, Deputy."

* * * * * *

On Aug. 2, 1940, defendant -- were brought before me, the said United States Commissioner, at my office, in the ----------, in said District, by ----------Deputy U. S. Marshal; and the complaint was then and there fully read and explained to the said defendant --, who thereupon, for plea, said -- he -- is "---------- guilty" as charged in said complaint.

* * * * * *

Thereupon on the 2d day of August 1940, I issued a temporary mittimus committing defendants---------- to the jail of Hamilton County, Tennessee, pending examination.

FEES OF U. S. COMMISSIONER

August 2: Issuing temporary commitment and making copy of same, $1.00; entering return of temporary commitment, 15¢.

In the Supreme Court of the United States

United States of America *v.* Benjamin McNabb, Freeman McNabb, and Raymond McNabb

STATE OF KENTUCKY

County of Jefferson

The Affiant, James D. Jones, states that he is now and was at all times mentioned herein, a duly appointed and acting Investigator of the Alcohol Tax Unit, Bureau of Internal Revenue, Treasury Department, and that:

Between 8:30 a. m., and 10:30 a. m., on the morning of August 1, 1940, I swore to a complaint in affidavit form before the United States Commissioner, James H. Anderson, Chattanooga, Hamilton County, Eastern District of Tennessee, charging Barney McNabb, Emuil McNabb, Freeman McNabb, and Raymond McNabb with violations of the internal revenue liquor laws, to-wit, Sections 3253, 3221, 2833, 2803 Internal Revenue Code, subsequent to the execution of which said James H. Anderson, United States Commissioner, came to the office of the Alcohol Tax Unit in the Post Office Building, Chattanooga, Tennessee, and there arraigned said Barney McNabb, Emuil McNabb, Freeman McNabb, and Raymond McNabb. Deputy U. S. Marshal Coyel V. Ricketts was present in the office of the Alcohol Tax Unit at the time of the arraignment of these defendants by the United States Commissioner.

Although I am unable to fix the exact time of the execution of the complaint and arraignment of the defendants on this date, I am positive it

all took place between the hours of 8:30 and 10:30 a. m., because I had been out on an investigation and returned to Chattanooga about 8:30 a. m., and soon after my arrival I called the U. S. Commissioner's Secretary, asked her to prepare a complaint affidavit for my signature, giving her the sections of law alleged to have been violated and other pertinent information. Later the United States Commissioner came to the office of the Alcohol Tax Unit, as above stated, with the complaint and I executed it before him. The arraignment by the Commissioner took place soon thereafter. I know all of this had been accomplished when H. B. Taylor, District Supervisor, and R. A. Beman, Assistant Supervisor, Enforcement, Alcohol Tax Unit, arrived at my office in Chattanooga. They arrived at 10:30 a. m., at which time the complaint had been executed and the arraignment concluded and the U. S. Commissioner had left the office prior to their arrival.

[S] JAMES D. JONES.

Subscribed and sworn to before me by James D. Jones, this 14 day of May 1943.

[S] MARY E. DAVIES,
Notary Public, Jefferson Co., Ky.

My commission expires Aug. 14, 1943. [SEAL]

FORT RILEY, KANSAS, *May 6, 1943.*

STATE OF KANSAS,
County of Geary:

I, Coyel V. Ricketts, of lawful age make the following statement freely and voluntarily, that the full truth may be known:

Early on the morning of August 1, 1940 one of the Investigators of the Alcohol Tax Unit, stationed at Chattanooga called me on the telephone and notified me of the killing of Investigator Sam Leeper. I was asked to come to the Federal Building in Chattanooga.

I immediately went to the office and found that Freeman McNabb, Raymond McNabb and Emuil McNabb had been arrested. I took custody of them to hold them until the U. S. Commissioner could be contacted and warrants could be obtained. I locked them in the hold-over cell adjacent to the U. S. Marshal's office.

I then went to the scene of the crime in Marion County, Tennessee, with Investigator Levy and M. L. Phipps. After making an investigation with bloodhounds I went to Jasper, Tennessee, and brought Barney McNabb from Jasper to Chattanooga.

During the morning of August 1, 1940, I received a warrant issued by U. S. Commissioner James H. Anderson charging Barney, Raymond, Freeman, and Emuil McNabb with a violation of the Internal Revenue liquor laws. I arrested these defendants on this warrant and sometime before noon U. S. Commissioner Anderson came to the office of the Alcohol Tax Unit, Chattanooga, Tennessee, and the four defendants were arraigned before him, the Commissioner committed them to jail in default of bail of $5,000.00 each. These defendants were held at the Federal Building in Chattanooga until late afternoon and then were taken to the Hamilton County Jail and committed on a temporary mittimus issued by U. S. Commissioner Anderson.

The following morning, August 2, 1940, Benjamin McNabb came to the office of the Alcohol Tax Unit and was questioned; the other four defendants were brought from jail for questioning. During that morning, I received a warrant for the arrest of Benjamin, Raymond, and Freeman McNabb charging them with the murder of Investigator Sam Leeper and one charging the same defendants with an assault on Investigator Frank Rennick.

I arrested the defendants on these warrants and took them before the U. S. Commissioner and they were committed to jail without bond; as I recall it, this also was at the Alcohol Tax Unit Office. I know that this was in the morning because I performed other duties that afternoon.

On August 7, 1940, I received a warrant charging Benjamin McNabb with a liquor violation committed on July 31, 1940. He was arrested on this warrant on the day it was received August 7, 1940.

A formal hearing was held on all of these charges on August 8, 1940, and all five of the defendants were held to action of a Grand Jury and were committed to jail.

I have read and signed each page of this statement, this being the fifth handwritten page I now swear that it is true.

[S] COYEL V. RICKETTS.

Sworn and subscribed to before me this sixth day of May 1943, at Service Club, Camp Forsythe, Fort Riley, Kansas.

[S] FRANK F. HADDEX,
Special Investigator, Alcohol Tax Unit.

In the Supreme Court of the United States

United States of America *v.* Benjamin McNabb, Freeman McNabb, and Raymond McNabb

STATE OF TENNESSEE,
Hamilton County:

Personally appeared before me the undersigned authority, James H. Anderson, who on oath states that he was formerly a United States Commissioner at Chattanooga; that he was acting as such Commissioner during all of the year 1940; that according to the Commissioner's Docket which affiant kept and in accordance with his recollection, of August 2, 1940 R. S. Abrahams, an alcohol tax unit investigator, appeared and swore out a complaint against the above named defendants charging them with the murder on the night of July 31, 1940 of Sam Leeper, an alcohol tax unit investigator. After said complaint had been made, affiant acting as United States Commissioner issued a warrant for Benjamin McNabb, Freeman McNabb and Raymond McNabb and placed the same in the hands of Coyel V. Ricketts, a Deputy United States Marshal, for service. Said complaint was made and the warrant was issued in the office of the Alcohol Tax Unit in the Federal Building in the city of Chattanooga. The substance of the complaint and the warrant was stated to the defendants. They were arraigned and trial was set for August 8, 1940 on which date the defendants were tried before affiant acting as United States Commissioner in the United States District Court room, Chattanooga and it

appearing, that defendants were probably guilty as charged, they were committed to the Hamilton County jail without bail.

Affiant further states that on the morning of August 1, 1940 on complaint by J. D. Jones, investigator of the alcohol tax unit, he issued a warrant for Barney McNabb, Raymond McNabb, Freeman McNabb and Emil McNabb charging them with operating an unregistered distillery, possessing untaxed paid spirits, and removing untaxed paid spirits to a place other than a bonded warehouse and said warrant was delivered to Coyel V. Ricketts, Deputy United States Marshal, for service on the morning of August 1, 1940 and according to return made by said deputy marshal on the back of the warrant and recorded in the commissioner's docket the same was executed by the arrest of Barney McNabb, Freeman McNabb, Raymond McNabb and Emil McNabb on the same day the warrant was issued and said defendants were brought before affiant on said warrant on the same date, namely, August 1, 1940 when they in default of bonds were committed to the Hamilton County jail.

[S] JAMES H. ANDERSON.

Subscribed and sworn to before me this 11th day of May 1943.

[S] M. B. HARRIS,
Notary Public Hamilton County, Tenn.

My commission expires April 26, 1945. [SEAL]

U. S. GOVERNMENT PRINTING OFFICE: 1943

pp. 9 + 11; Reed J. opinion p. 2.

SUPREME COURT OF THE UNITED STATES.

No. 25.—October Term, 1942.

Benjamin McNabb, Freeman McNabb, and Raymond McNabb, Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 1, 1943.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The petitioners are under sentence of imprisonment for forty-five years for the murder of an officer of the Alcohol Tax Unit of the Bureau of Internal Revenue engaged in the performance of his official duties. (18 U. S. C. § 253.) They were convicted of second-degree murder in the District Court for the Eastern District of Tennessee, and on appeal to the Circuit Court of Appeals for the Sixth Circuit the convictions were sustained. 123 F. 2d 848. We brought the case here because the petition for certiorari presented serious questions in the administration of federal criminal justice. 316 U. S. 658. Determination of these questions turns upon the circumstances relating to the admission in evidence of incriminating statements made by the petitioners.

On the afternoon of Wednesday, July 31, 1940, information was received at the Chattanooga office of the Alcoholic Tax Unit that several members of the McNabb family were planning to sell that night whiskey on which federal taxes had not been paid. The McNabbs were a clan of Tennessee mountaineers living about twelve miles from Chattanooga in a section known as the McNabb Settlement. Plans were made to apprehend the McNabbs while actually engaged in their illicit enterprise. That evening four revenue agents, accompanied by the Government's informers, drove to the McNabb Settlement. When they approached the rendezvous arranged between the McNabbs and the informers, the officers got out of the car. The informers drove on and met five of the McNabbs, of whom three—the twin brothers Freeman and Raymond, and their cousin Benjamin—are the petitioners here. (The two others, Emuil and Barney McNabb, were acquitted at the direction of the trial court.) The group proceeded to a spot

near the family cemetery where the liquor was hidden. While cans containing whiskey were being loaded into the car, one of the informers flashed a prearranged signal to the officers who thereupon came running. One of these called out, "All right, boys, federal officers!", and the McNabbs took flight.

Instead of pursuing the McNabbs, the officers began to empty the cans. They heard noises coming from the direction of the cemetery, and after a short while a large rock landed at their feet. An officer named Leeper ran into the cemetery. He looked about with his flashlight but discovered no one. Noticing a couple of whiskey cans there, he began to pour out their contents. Shortly afterwards the other officers heard a shot; running into the cemetery they found Leeper on the ground, fatally wounded. A few minutes later—at about ten o'clock—he died without having identified his assailant. A second shot slightly wounded another officer. A search of the cemetery proved futile, and the officers left.

About three or four hours later—between one and two o'clock Thursday morning—federal officers went to the home of Freeman, Raymond, and Emuil McNabb and there placed them under arrest. Freeman and Raymond were twenty-five years old. Both had lived in the Settlement all their lives; neither had gone beyond the fourth grade in school; neither had ever been farther from his home than Jasper, twenty-one miles away. Emuil was twenty-two years old. He, too, had lived in the Settlement all his life, and had not gone beyond the second grade.

Immediately upon arrest, Freeman, Raymond, and Emuil were taken directly to the Federal Building at Chattanooga. They were not brought before a United States Commissioner or a judge. Instead, they were placed in a detention room (where there was nothing they could sit or lie down on, except the floor), and kept there for about fourteen hours, from three o'clock Thursday morning until five o'clock that afternoon. They were given some sandwiches. They were not permitted to see relatives and friends who attempted to visit them. They had no lawyer. There is no evidence that they requested the assistance of counsel, or that they were told that they were entitled to such assistance.

Barney McNabb, who had been arrested early Thursday morning by the local police, was handed over to the federal authorities about nine or ten o'clock that morning. He was twenty-eight years old; like the other McNabbs he had spent his entire life in the Settle-

ment, had never gone beyond Jasper, and his schooling stopped at the third grade. Barney was placed in a separate room in the Federal Building where he was questioned for a short period. The officers then took him to the scene of the killing, brought him back to the Federal Building, questioned him further for about an hour, and finally removed him to the county jail three blocks away.

In the meantime, direction of the investigation had been assumed by H. B. Taylor, district supervisor of the Alcohol Tax Unit, with headquarters at Louisville, Kentucky. Taylor was the Government's chief witness on the central issue of the admissibility of the statements made by the McNabbs. Arriving in Chattanooga early Thursday morning, he spent the day in study of the case before beginning his interrogation of the prisoners. Freeman, Raymond, and Emuil, who had been taken to the county jail about five o'clock Thursday afternoon, were brought back to the Federal Building early that evening. According to Taylor, his questioning of them began at nine o'clock. Other officers set the hour earlier.[1]

Throughout the questioning, most of which was done by Taylor, at least six officers were present. At no time during its course was a lawyer or any relative or friend of the defendants present. Taylor began by telling "each of them before they were questioned that we were Government officers, what we were investigating, and advised them that they did not have to make a statement, that they need not fear force, and that any statement made by them would be used against them, and that they need not answer any questions asked unless they desired to do so".

The men were questioned singly and together. As described by one of the officers, "They would be brought in, be questioned possibly at various times, some of them half an hour, or maybe an hour, or maybe two hours". Taylor testified that the questioning continued until one o'clock in the morning, when the defendants were taken back to the county jail.[2]

The questioning was resumed Friday morning, probably sometime between nine and ten o'clock.[3] "They were brought down

[1] Officer Burke testified that the questioning Thursday night began at 6 P. M., Officer Kitts, at 7 P. M., and Officer Jakes, at "possibly 6 or 7 o'clock".

[2] Here again Taylor's testimony is at variance with that of other officers. Officer Kitts estimated that the questioning Thursday night ended at 10 P. M., Officer Burke, at 11 P. M., and Officer Jakes, at midnight. No officer testified that the questioning that night lasted less than three hours.

[3] Taylor testified that the McNabbs were brought back Friday morning "probably about nine or nine-thirty". None of the other officers could recall

from the jail several times, how many I don't know. They were questioned one at a time, as we would finish one he would be sent back and we would try to reconcile the facts they told, connect up the statements they made, and then we would get two of them together. I think at one time we probably had all five together trying to reconcile their statements. . . . When I knew the truth I told the defendants what I knew. I never called them damn liars, but I did say they were lying to me. . . . It would be impossible to tell all the motions I made with my hands during the two days of questioning, however, I didn't threaten anyone. None of the officers were prejudiced towards these defendants nor bitter toward them. We were only trying to find out who killed our fellow officer."

Benjamin McNabb, the third of the petitioners, came to the office of the Alcohol Tax Unit about eight or nine o'clock Friday morning and voluntarily surrendered. Benjamin was twenty years old, had never been arrested before, had lived in the McNabb Settlement all his life, and had not got beyond the fourth grade in school. He told the officers that he had heard that they were looking for him but that he was entirely innocent of any connection with the crime. The officers made him take his clothes off for a few minutes because, so he testified, "they wanted to look at me. This scared me pretty much."[4] He was not taken before a United States Commissioner or a judge. Instead, the officers questioned him for about five or six hours. When finally in the afternoon he was confronted with the statement that the others accused him of having fired both shots, Benjamin said, "If they are going to accuse me of that, I will tell the whole truth; you may get your pencil and paper and write it down." He then confessed that he had fired the first shot, but denied that he had also fired the second.

Because there were "certain discrepancies in their stories, and we were anxious to straighten them out", the defendants were brought to the Federal Building from the jail between nine and ten o'clock Friday night. They were again questioned, sometimes separately, sometimes together. Taylor testified that "We had

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the exact time. Officer Burke thought "it must have been after nine o'clock" while Officer Jakes guessed that it was "somewhere around ten or eleven o'clock in the morning".

[4] Taylor testified that the reason for having Benjamin remove his clothes was that "I was informed that he had gotten an injury running through the woods or that he had been hit by a stray shot. We didn't know whether or not this was true, and asked him to take his clothes off in order to examine him and find out."

Freeman McNabb on the night of the second [Friday] for about three and one-half hours. I don't remember the time but I remember him particularly because he certainly was hard to get anything out of. He would admit he lied before, and then tell it all over again. I knew some of the things about the whole truth and it took about three and one-half hours before he would say it was the truth, and I finally got him to tell a story which he said was true and which certainly fit better with the physical facts and circumstances than any other story he had told. It took me three and one-half hours to get a story that was satisfactory or that I believed was nearer the truth than when we started."

The questioning of the defendants continued until about two o'clock Saturday morning, when the officers finally "got all the discrepancies straightened out." Benjamin did not change his story that he had fired only the first shot. Freeman and Raymond admitted that they were present when the shooting occurred, but denied Benjamin's charge that they had urged him to shoot. Barney and Emuil, who were acquitted at the direction of the trial court, made no incriminating admissions.

Concededly, the admissions made by Freeman, Raymond and Benjamin constituted the crux of the Government's case against them, and the convictions cannot stand if such evidence be excluded. Accordingly, the question for our decision is whether these incriminating statements, made under the circumstances we have summarized,[5] were properly admitted. Relying upon

[5] To determine the admissibility of the statements secured from the defendants while they were in the custody of the federal officers, the trial court conducted a preliminary examination in the absence of the jury. After hearing the evidence (consisting principally of the testimony of the defendants and the officers), the court concluded that the statements were admissible. An exception to this ruling was taken. When the jury was recalled, the witnesses for the Government repeated their testimony. The defendants rested upon their claim that the trial court erred in admitting these statements, and stood on their constitutional right not to take the witness stand before the jury. At the conclusion of the Government's case the defendants moved to exclude from the consideration of the jury the evidence relating to the admissions made by them. This motion was denied. The motion was renewed at the conclusion of the defendants' case, and again was denied. The court charged the jury that the defendants' admissions should be disregarded if found to have been involuntarily made. The issue of law which was decided by the trial court in admitting the statements made by the petitioners did not become, therefore, a question of fact foreclosed by the jury's general verdict of guilty. Under these circumstances we have treated as facts only the testimony offered on behalf of the Government and so much of the petitioners' evidence as is neither contradicted by nor inconsistent with that of the Government.

the guarantees of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law", the petitioners contend that the Constitution itself forbade the use of this evidence against them. The Government counters by urging that the Constitution proscribes only "involuntary" confessions, and that judged by appropriate criteria of "voluntariness" the petitioners' admissions were voluntary and hence admissible.

It is true, as the petitioners assert, that a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. *Boyd* v. *United States*, 116 U. S. 616; *Weeks* v. *United States*, 232 U. S. 383; *Gouled* v. *United States*, 255 U. S. 298; *Amos* v. *United States*, 255 U. S. 313; *Agnello* v. *United States*, 269 U. S. 20; *Byars* v. *United States*, 273 U. S. 28; *Grau* v. *United States*, 287 U. S. 124. And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions "secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified", *Lisenba* v. *California*, 314 U. S. 219, 239-40, or "who have been unlawfully held incommunicado without advice of friends or counsel", *Ward* v. *Texas*, 316 U. S. 547, 555, and see *Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227; *Canty* v. *Alabama*, 309 U. S. 629; *White* v. *Texas*, 310 U. S. 530; *Lomax* v. *Texas*, 313 U. S. 544; *Vernon* v. *Alabama*, 313 U. S. 547.

In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice" *Hebert* v. *Louisiana*, 272 U. S. 312, 316, which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing

trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.

The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see *Nardone* v. *United States*, 308 U. S. 338, 341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. *E. g.*, *Ex parte Bollman & Swartwout*, 4 Cranch 75, 130-31; *United States* v. *Palmer*, 3 Wheat. 610, 643-44; *United States* v. *Pirates*, 5 Wheat. 184, 199; *United States* v. *Gooding*, 12 Wheat. 460, 468-70; *United States* v. *Wood*, 14 Pet. 430; *United States* v. *Murphy*, 16 Pet. 203; *Funk* v. *United States*, 290 U. S. 371; *Wolfle* v. *United States*, 291 U. S. 7; see 1 Wigmore on Evidence (3d ed. 1940) pp. 170-97; Note, 47 Harv. L. Rev. 853.[6] And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance.

Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them. They subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the in-

[6] The function of formulating rules of evidence in areas not governed by statute has always been one of the chief concerns of courts: "The rules of evidence on which we practise today have mostly grown up at the hands of the judges; and, except as they may be really something more than rules of evidence, they may, in the main, properly enough be left to them to be modified and reshaped." J. B. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) pp. 530-31.

tegrity of the criminal proceeding. Congress has explicitly commanded that "It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the United States Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial . . .". 18 U. S. C. § 595. Similarly, the Act of June 18, 1934, c. 595, 48 Stat. 1008, 5 U. S. C. § 300a, authorizing officers of the Federal Bureau of Investigation to make arrests, requires that "the person arrested shall be immediately taken before a committing officer." Compare also the Act of March 1, 1879, c. 125, 20 Stat. 327, 341, 18 U. S. C. § 593, which provides that when arrests are made of persons in the act of operating an illicit distillery, the arrested persons shall be taken forthwith before some judicial officer residing in the county where the arrests were made, or if none, in the county nearest to the place of arrest. Similar legislation, requiring that arrested persons be promptly taken before a committing authority, appears on the statute books of nearly all the states.[7]

The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect

[7] Alabama—Code, 1940, Tit. 15, § 160; Arizona—Code, 1939, §§ 44-107, 44-140, 44-141; Arkansas—Digest of Statutes, 1937, §§ 3729, 3731; California—Penal Code, 1941, §§ 821-29, 847-49; Colorado—Statutes, 1935, c. 48, § 428; Connecticut—Gen. Stats., 1930, § 239; Delaware—Rev. Code, 1935, §§ 4456, 5173; District of Columbia—Code, 1940, §§ 4-140, 23-301; Florida—Statutes, 1941, §§ 901.06, 901.23; Georgia—Code, 1933, §§ 27-210, 27-212; Idaho—Code, 1932, §§ 19-515, 19-518, 19-614, 19-615; Illinois—Rev. Stats., 1941, c. 38, §§ 655, 660; Indiana—Baldwin's Stats. Ann., 1934, § 11484; Iowa—Code, 1939, §§ 13478, 13481, 13486, 13488; Kansas—Gen. Stats., 1935, § 62-610; Kentucky—Code, 1938, §§ 45-46; Louisiana—Code of Criminal Procedure, 1932, § 65, 79, 80; Maine—Rev. Stats., 1930, c. 145, § 9; Massachusetts—Gen. Laws, 1932, c. 276, §§ 22, 29, 34; Michigan—Stats. Ann., 1938, §§ 28.863, 28.872, 28.873, 28.885; Minnesota—Mason's Stats., 1927, c. 104, §§ 10575, 10581; Mississippi—Code, 1930, c. 21, § 1250; Missouri—Rev. Stats., 1939, §§ 3862, 3883; Montana—Rev. Code, 1935, §§ 11731, 11739.40; Nebraska—Comp. Stats., 1929, § 29-412; Nevada—Comp. Laws, 1929, §§ 10744-48, 10762-64; New Hampshire—Pub. Laws, 1926, c. 364, § 13; New Jersey—Rev. Stats., 1937, § 2:216-9; New York—Code of Criminal Procedure, 1939, §§ 158-59, 165, 185; North Carolina—Code, 1939, §§ 4528, 4548; North Dakota—Comp. Laws, 1913, §§ 10543, 10548, 10576, 10578; Ohio—Throckmorton's Code, 1940, §§ 13432-3, 13432-4; Oklahoma—Statutes, 1941, Tit. 22, §§ 176-77, 181, 205; Oregon—Code, 1930, §§ 13-2117, 13-2201; Pennsylvania—Purdon's Stats. Ann., Perm. ed., Tit. 19, §§ 3, 4; Rhode Island—Gen. Laws, 1938, c. 625, § 68; South Carolina—Code, 1942, §§ 907, 920; South Dakota—Code, 1939, §§ 34.1608, 34.1619-24; Tennessee—Michie's Code, 1938, §§ 11515, 11544; Texas—Code of Criminal Procedure, 1936, Arts. 233-35; Utah—Rev. Stats., 1933, §§ 105-4-4, 105-4-5, 103-26-51; Virginia—Code, 1942, §§ 4826, 4827a; Washington—Rev. Stats., 1932, § 1949; West Virginia—Code, 1937, § 6150; Wisconsin—Statutes, 1941, § 361.08; Wyoming—Rev. Stats., 1931, §§ 33-108, 33-110, 33-115.

for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the "third degree" which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection.[8] A statute carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application.

The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon federal law officers. Freeman and Raymond McNabb were arrested in the middle of the night at their home. Instead of being brought before a United States Commissioner or a judicial officer, as the law requires, in order to determine the sufficiency of the justification for their detention, they were put in a barren cell and kept there for fourteen hours. For

[8] "During the discussions which took place on the Indian Code of Criminal Procedure in 1872 some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced civil officer observed, 'There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.' This was a new view to me, but I have no doubt of its truth.'" Sir James Fitzjames Stephen, A History of the Criminal Law of England (1883) vol. 1, p. 442 note. Compare §§ 25 and 26 of the Indian Evidence Act (1872).

two days they were subjected to unremitting questioning by numerous officers. Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the benefit of counsel. The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.

Unlike England, where the Judges of the King's Bench have prescribed rules for the interrogation of prisoners while in the custody of police officers,[9] we have no specific provisions of law governing federal law enforcement officers in procuring evidence from persons held in custody. But the absence of specific restraints going beyond the legislation to which we have referred does not imply that the circumstances under which evidence was secured are irrelevant in ascertaining its admissibility. The mere fact that a confession was made while in the custody of the police does not render it inadmissible. Compare *Hopt* v. *Utah*, 110 U. S. 574; *Sparf* v. *United States*, 156 U. S. 51, 55; *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 157; *Wan* v. *United States*, 266 U. S. 1, 14. But where in the course of a criminal

[9] In 1912 the Judges of the King's Bench, at the request of the Home Secretary, issued rules for the guidance of police officers. See Rex *v.* Voisin, L. R. [1918] 1 K. B. 531, 539. These rules were amended in 1918, and in 1930 a circular was issued by the Home Office, with the approval of the Judges, in order to clear up difficulties in their construction. 6 Police Journal (1933) 352-56, containing the texts of the Judge's Rules and the Circular. See Report of the Royal Commission on Police Powers and Procedure (1929) Cmd. 3297. Although the Rules do not have the force of law, Rex *v* Voison, *supra*, the English courts insist that they be strictly observed before admitting statements made by accused persons while in the custody of the police. See 1 Taylor on Evidence (12th ed. 1931) pp. 556-62; "Questioning an Accused Person", 92 Justice of the Peace and Local Government Review 743, 758 (1928); Keedy, Preliminary Examination of Accused Persons in England, 73 Proceedings of American Philosophical Society 103 (1934). For a dramatic illustration of the English attitude towards interrogation of arrested persons by the police, see Inquiry in regard to the Interrogation by the Police of Miss Savidge (1928) Cmd. 3147.

trial in the federal courts it appears that evidence has been obtained in such violation of legal rights as this case discloses, it is the duty of the trial court to entertain a motion for the exclusion of such evidence and to hold a hearing, as was done here, to determine whether such motion should be granted or denied. Cf. *Gouled* v. *United States*, 255 U. S. 298, 312-13; *Amos* v. *United States*, 255 U. S. 313; *Nardone* v. *United States*, 308 U. S. 338, 341-42. The interruption of the trial for this purpose should be no longer than is required for a competent determination of the substantiality of the motion. As was observed in the *Nardone* case, *supra*, "The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling on preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges." 308 U. S. at 342.

In holding that the petitioners' admissions were improperly received in evidence against them, and that having been based on this evidence their convictions cannot stand, we confine ourselves to our limited function as the court of ultimate review of the standards formulated and applied by federal courts in the trial of criminal cases. We are not concerned with law enforcement practices except insofar as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law.

Reversed.

Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 25.—October Term, 1942.

Benjamin McNabb, Freeman McNabb, and Raymond McNabb, Petitioners,
vs.
The United States of America.
On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 1, 1943.]

Mr. Justice Reed, dissenting.

I find myself unable to agree with the opinion of the Court in this case. An officer of the United States was killed while in the performance of his duties. From the circumstances detailed in the Court's opinion, there was obvious reason to suspect that the petitioners here were implicated in firing the fatal shot from the dark. The arrests followed. As the guilty parties were known only to the McNabbs who took part in the assault at the burying ground, it was natural and proper that the officers would question them as to their actions.[1]

The cases just cited show that statements made while under interrogation may be used at a trial if it may fairly be said that the information was given voluntarily. A frank and free confession of crime by the culprit affords testimony of the highest credibility and of a character which may be verified easily. Equally frank responses to officers by innocent people arrested under misapprehension give the best basis for prompt discharge from custody. The realization of the convincing quality of a confession tempts officials to press suspects unduly for such statements. To guard accused persons against the danger of being forced to confess, the law admits confessions of guilt only when they are voluntarily made. While the connotation of voluntary is indefinite, it affords an understandable label under which can be readily classified the various acts of terrorism, promises, trickery and threats which have led this and other courts to refuse admission as evidence to con-

[1] Hopt *v.* Utah, 110 U. S. 574, 584; Sparf and Hansen *v.* United States, 156 U. S. 51, 55; Pierce *v.* United States, 160 U. S. 355; Wilson *v.* United States, 162 U. S. 613, 623; cf. Bilokumsky *v.* Tod, 263 U. S. 149, 157.

fessions.[2] The cases cited in the Court's opinion show the broad coverage of this rule of law. Through it those coerced into confession have found a ready defense from injustice.

Were the Court today saying merely that in its judgment the confessions of the McNabbs were not voluntary, there would be no occasion for this single protest. A notation of dissent would suffice. The opinion, however, does more. Involuntary confessions are not constitutionally admissible because violative of the provision of self-incrimination in the Bill of Rights. Now the Court leaves undecided whether the present confessions are voluntary or involuntary and declares that the confession must be excluded because in addition to questioning the petitioners, the arresting officers failed promptly to take them before a committing magistrate. The Court finds a basis for the declaration of this new rule of evidence in its supervisory authority over the administration of criminal justice. I question whether this offers to the trial courts and the peace officers a rule of admissibility as clear as the test of the voluntary character of the confession. I am opposed to broadening the possibilities of defendants escaping punishment by these more rigorous technical requirements in the administration of justice. If these confessions are otherwise voluntary, civilized standards, in my opinion, are not advanced by setting aside these judgments because of acts of omission which are not shown to have tended toward coercing the admissions.

Our police officers occasionally overstep legal bounds. This record does not show when the petitioners were taken before a committing magistrate. No point was made of the failure to commit by defendant or counsel. No opportunity was given to the officers to explain. Objection to the introduction of the confession was made only on the ground that they were obtained through coercion. This was determined against the accused both by the Court, when it appraised the fact as to the voluntary character of the confession, preliminarily to determining the legal question of its admissibility, and by the jury. The Court saw and heard witnesses for the prosecution and the defense. The defendants did not take the stand before the jury. The uncontradicted evidence does not require a different conclusion. The officers of the Alcohol Tax Unit should not be disciplined by overturning this conviction.

[2] "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." Wilson *v.* United States, 162 U. S. 613, 623; Lisenba *v.* California, 314 U. S. 219, 239.